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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO.

GASTON COUNTY DYEING MACHINE COMPANY,

Petitioner

v.

MARVIN W. BROWN.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review a decision which that Court has rendered in a case involving the parties above-named. And the petitioner respectfully shows to this Court:

THE OPINIONS AND ORDERS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has been officially reported at 457

F. 2d 1377 and has been unofficially reported at 4 EPD ¶7737 and 4 FEP Cases 514.

This case came to the Court of Appeals upon an appeal from the United States District Court for the Western District of North Carolina. The opinion of the District Court has been officially reported at 325 F. Supp. 541 and has been unofficially reported at 3 EPD ¶8086 and 3 FEP Cases 360.

The opinion of the Court of Appeals and the Order Denying Rehearing En Banc are printed in the Appendix to this Petition. The Opinion and Order of the District Court are also printed in the Appendix.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals was rendered on March 28, 1972. Rehearing En Banc was denied May 22, 1972.

Jurisdiction to review the Judgment of the Court of Appeals is conferred on this Court by the provisions of 28 U.S.C. ¶1254.

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. If a plaintiff brings suit against his former employer under Title VII of the Civil Rights Act of 1964, and the District Court and the Court of Appeals both agree that the evidence fails to establish any claim in his behalf under the Act, does the law confer upon him any standing to prosecute an action on behalf of other employees with respect to events occuring after he quit his employment?

2. In a case in which the trial court finds, upon all the evidence, that an employer has not engaged in racial discrimination in violation of Title VII of the Civil Rights Act of 1964 — but in which a statistical tabulation shows that on a particular day, during the period of time involved in the case, the percentages of Negroes in the employer's job categories did not equal the general percentage of Negroes in the surrounding community, which circumstance is however affirmatively explained in the trial testimony — does a United States Court of Appeals have authority to require the employer to see to it that the racial make-up of its various job categories shall become altered so as to correspond to that of the surrounding community, even though §703(j) of the Act provides that nothing in the Act is to be construed as requiring a racially balanced work force nor the according of any preferential treatment to any racial group for the purpose of altering the racial make-up of a work force?

3. Does 42 U.S.C. ¶1981, which prohibits certain forms of public racial discrimination by the several states of the United States, also prohibit such discrimination by private employers, and confer upon employees rights to sue and to be awarded monetary damages in private litigation?

4. Is an employer denied due process of law when, on appeal to a United States Court of Appeal, it is ruled by that Court initially that such employer discriminated against an employee prior to 1961, for

which, says that Court, the employer must respond in damages, even though there was no allegation and no finding of such discrimination during such period of time, nor any litigation of such question in the proceedings before the trial court?

5. Does Title VII of the Civil Rights Act of 1964, which grants to the trial court discretionary authority to award attorneys' fees to a party who prevails in litigation under that Act, accord to a Court of Appeals authority to direct a District Court to award such fees upon aspects of the case which have not been considered or litigated in the District Court, and even upon aspects of the case as to which the party required to pay the fees was the prevailing party both in the District Court and in the Court of Appeal?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Amendment VII, United States Constitution

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security

of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. ¶1981

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer t give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29."

42 U.S.C. ¶2000e-2(h)

"Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area."

42 U.S.C. ¶2000e-2(j)

"In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

42 U.S.C. ¶2000e-5(k)

"Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class

is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Rule 23(a), Federal Rules
of Civil Procedure

STATEMENT OF THE CASE

The defendant Company employs approximately 215 production workers in the manufacture, fabrication, and installation of large pressurized dyeing machines. Each of these machines is designed and built to the customer's order from blueprints, plans and specifications which are prepared by the Company's engineering department, working in conjunction with its sales staff and customer representatives (A178).[1] Included in the work force are welders, welder-fabricators, machinists, and erectors. The qualifications of these employees range from moderately skilled to very highly skilled (A178, A179).

The most complex and exacting job, and the one which merits the highest pay, is that of welder-fabricator (A178; App. 26a).[2] A welder-fabricator must

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[1]Undesignated references are to pages in the Appendix filed with the Court of Appeals for the Fourth Circuit.

[2]References preceded by "App." are to pages in the Appendix to this Petition.

work to very close tolerances, read blueprints, and exercise independent mechanical judgment at all times (A178-A182). Many years are required for such an employee to achieve the skills necessary for this work, and the training process on this job never ends (A179).

This suit was filed on May 31, 1966, by Marvin W. Brown, plaintiff. He alleged that, in and after November 1961, he and other Negroes similarly situated were subjected to racial discrimination in matters of employment, classification, wages, promotion and other incidents of employment. The plaintiff alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, as well as violations of Title 42 U.S.C. §§1981 and 1983.

The case was tried before the Honorable James B. McMillan, United States District Judge for the Western District of North Carolina, sitting without a jury. The Court's decision was issued on December 31, 1970. As a prelude to his consideration of the plaintiff's individual claim, the District Judge noted in passing, but did not specifically find, that the plaintiff "... *may* have been originally denied a welding job because of race ..." prior to the violation alleged, that is, prior to 1961 (App. 29a) (emphasis supplied). He then made formal findings from the evidence that the plaintiff had been offered full opportunity for advancement to the status of journeyman welder-fabricator and that there was no discrimination against him during the period relevant to the litigation, that is, No-

vember 1961 through the plaintiff's resignation several years later (App. 28a-30a). The Court concluded, accordingly, that the company had not violated the plaintiff's rights under Title VII of the Civil Rights Act of 1964, and dismissed his action. These rulings of the District Judge were sustained by the Court of Appeals (App. 4a-5a).

The appellate Court, however, vacated the District Judge's dismissal order in part on the ground that 42 U.S.C. §1981, relating to public rights and actions, conferred upon the plaintiff a private right which was violated by the defendant for which the plaintiff is entitled to a private remedy of damages in the form of back wages. In apparent reliance upon the passing reference of the District Judge, quoted above, a majority of the appellate Court concluded that "The district judge's findings established that the Company violated 42 U.S.C. §1981 by denying Brown a welding job because of his race from the time he applied in 1960 until he was employed as a welder-trainee in 1961" (App. 4a). Upon the basis of that, it was ruled that the plaintiff was entitled to monetary damages and attorneys' fees (App. 4a, 13a).

In a fully stated opinion, Judge Dupree dissented, primarily on the ground that the Company had been denied the right to defend itself against any claim that it discriminated against the plaintiff prior to the dates complained of in his allegations, approximately four years before the effective date of the Civil Rights Act of 1964 (App. 14a-22a).

With respect to the class action, no direct evidence was offered in an effort to prove that, after the effective date of the 1964 Act, whites were preferred over blacks possessing equal or superior qualifications, or that whites received job assignments denied to blacks possessed of skills requisite for jobs which were denied them.

Even though, for a period of one year in discovery proceedings, the plaintiff was given unlimited access to all of the defendant's records relating to that aspect of the case, the plaintiff offered only a statistical head count of black and white employees in the work force on one day — September 3, 1969 — in the period of over four years which was brought under the Court's scrutiny. In his findings of fact, the District Judge considered the circumstantial significance of that single statistic but rejected it as proof because he found "on the other side of the ledger a number of facts . . ." in the uncontradicted direct evidence which he credited and summarized as follows:

> "All company functions, on and off the premises, have been desegregated for a decade or so. Brown himself was employed in 1961 to be a welder and his advancement was encouraged. When the Civil Rights Act took effect in 1965, the policy was announced that the Act would be observed. Advertisements for welders for at least two years have been without regard to race. *Since 1965, defendant has made genuine and often successful efforts to recruit black workers for the higher paid welding*

jobs, and have offered promotional transfers to black employees. Some have accepted those transfers and gone ahead; a larger number have tried the welder-fabricator life and then abandoned it for more familiar and less exacting tasks" (Emphasis supplied.)

(App. 30a-31a)

Although the Court of Appeals virtually quoted the foregoing findings of fact of the District Court, with approval, it reversed the District Court's conclusion that there had been no showing of a violation of the Act in the class action and vacated the District Court's order dismissing the suit. The Court of Appeals found in the head count of September 3, 1969 "statistical indicia of discrimination" which, it declared, was not ". . . rebutted by the company's efforts since 1965 to hire and promote black employees" (App. 10a). The Court further stated, in effect, that the circumstantial "indicia of discrimination" it found in the September 3, 1969, head count *could not be refuted* by direct evidence of the sort credited in the District Court's findings because "The company lacks objective guidelines for hiring, for pay increases within job classifications, and for promotion or transfer from one job to another (App. 11a).

The Court of Appeals also ruled that even though the plaintiff ". . . has not proved his own Title VII claim, the class of employees he represents is not for this reason deprived of a remedy" (App. 5a). The case was ordered to be remanded to the District

Court with direction that jurisdiction be retained by that Court until it is shown that the racial balance of the work force, as related to the racial balance of the surrounding community, shows that the ". . . company's employment policies have completely eliminated the unlawful practices prohibited by §703(a) . . ." (App. 13a).

Because of the disposition the District Judge made of the case, it obviously had no opportunity or occasion to pass on the question of attorneys' fees or costs of the action which the statute permits him, in his discretion, to award to a prevailing party in a Title VII action. Nevertheless, the Court of Appeals mandatorily directed that the plaintiff be awarded attorneys' fees and the costs of the action (App. 13a).

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. The Court of Appeals decision allows the class action to proceed under Title VII of the Civil Rights Act of 1964, notwithstanding that the individual plaintiff voluntarily quit his employment prior to initiating this action, has had no contact with the Company or its employees since January 1966 and failed to establish any discrimination by the Company against him since 1961. This decision, granting standing to the plaintiff to prosecute issues which do not concern him, is in direct conflict with the applicable federal rules of civil procedure, with the decision of another Court of Appeals in circumstances materially indistinguishable and with the established principles regarding standing to sue in a class action which have been reconfirmed in a very recent decision of this Court.

2. The findings of the District Court that the evidence as a whole did not establish that racial discrimination in violation of the Civil Rights Act of 1964 had occurred was rejected by the Court of Appeals not because it was clearly erroneous but for the mere reason that a single post-Act head count of employees by race and by department purported to show that on September 3, 1969, the Company's job categories were not racially balanced. This decision is a substantial departure from the usual and customary function of appellate review, is in contradiction of the language of the Civil Rights Act and the intent of its framers, and is in conflict with principles established by another Court of Appeals. Such important, recurrent federal issues should be settled by this Court.

3. The Court of Appeals decision rejected established precedent which earlier limited the applicability of 42 U.S.C. §1981 to those cases involving "state action," expanded the scope of the statute to cover private employers and imposed damages upon the petitioner, a private employer, for certain conduct in 1960, at a time when that conduct was not considered unlawful under the law as it then existed. This is an unwarranted and patently unjust retroactive application of a new interpretation of a statute, giving it *ex post facto* effect, which punishes the petitioner for acts it could not reasonably have known were unlawful. It creates a recurrent question of federal law which should be settled by this Court.

4. The ruling by the Court of Appeals that the Company's failure to give the plaintiff a welding job in 1960 violated 42 U.S.C. §1981, and that the petitioner must pay the plaintiff damages for such violation even though such violation was neither alleged nor passed upon by the District Court, has denied the petitioner the opportunity to plead the statute of limitations which would have barred recovery, has denied the petitioner the opportunity to demand a jury trial as to this issue, and constitutes such a fundamental departure from due process of law and the usual course of fairness and justice in judicial proceedings as to call for the exercise of this Court's power of supervisory jurisdiction.

5. The question of whether 42 U.S.C. §1981 creates rights and remedies against private discrimination in employment predating the Civil Rights Act of 1964 is an important question of federal law which has been decided by the Court of Appeals in conflict with applicable decisions of this Court.

6. The Court of Appeals direction to the District Court that it must require the Company to pay attorneys' fees to the plaintiff's attorneys is in direct conflict with Title VII of the Civil Rrights Act of 1964 which places the question of such an award in the discretion of the District Court.

AMPLIFICATION OF REASONS WHY CERTIORARI SHOULD BE GRANTED

A. Since The Plaintiff Has Not Proved His Own Title VII Claim, And Resigned From His Employment With The Company Four Months Before He Instituted This Action, He Has No Standing To Pursue This Action In Behalf Of A Class of Employees

The plaintiff voluntarily left his employment with the Company in January 1966, approximately four months before he instituted this action. He neither seeks backpay for the period following his resignation nor reinstatement to his job. His only claim that he was an appropriate representative of a class of employees arose out of his allegations that he had suffered wrongdoing by the Company under Title VII of the Civil Rights Act of 1964.

At all stages of the litigation, the Company objected to the class action on the ground that the plaintiff had no valid individual claim under that Act and therefore had no standing to sue as a class representative. This objection was overruled by the Court of Appeals with the declaration that:

> "While Brown has not proved his own Title VII claim, the class of employees he represents is not for this reason deprived of a remedy."
>
> (App. 5a)

Under the circumstances the appellate Court's decision to grant the plaintiff standing to proceed

with the litigation of issues which do not affect him makes a mockery of Rule 23 and the well-established principles of this Court with regard to standing to litigate. The decision amounts to a license for any malcontent person to drag a former employer through years of boundless litigation over personnel and employment practices having nothing whatever to do with the individual plaintiff. Congress certainly did not intend to license such private, random searches, investigations or inquisitions.

This Court has very recently reconfirmed the established principle that the mere fact that the plaintiff is black does not license him to prosecute a company for any and all claims of racial discrimination that might have been raised by others.

> "Any injury to appellee from the conduct of Moose Lodge stemmed not from the lodge's membership requirements, but from its policies with respect to the serving of guests of members. Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others. Virginia Railway v. Federation, 300 U.S. 515, 558 (1937); Erie Railroad Co. v. Williams, 233 U.S. 685, 697.
>
> * * *
>
> "We believe that Moose Lodge is correct, therefore, in contending that the District Court in its decree went beyond the vindication of any claim that appellee had standing to litigate.
>
> * * *

"Because appellee had no standing to litigate a constitutional claim arising out of Moose Lodge's membership practices, the District Court erred in reaching that issue on the merits.

• • •

Moose Lodge No. 107
v. Irvis, — U.S. —,
32 L. Ed. 2d 627, —
S. Ct. —, 40 LW 4715,
4716 (June 12, 1972)

In a factual context not materially distinguishable from the instant case where the plaintiff's employment had ended a number of months before the suit was filed, the Court of Appeals for the Fifth Circuit refused to allow the plaintiff to pursue class remedies. In that case, the District Court found that:

"Plaintiff was not an employee at the time of the filing of his complaint in which he was the only named plaintiff. The Court concludes that he is not entitled to reinstatement to such status.

"Two prerequisites to a class action, embodied in Rule 23(a) of F.R.C.P., are absent here. The class is not so numerous that joinder of all members is impracticable. Plaintiff could not and will not fairly and adequately protect the interests of the class of defendant's employees, present or future. An order will be entered denying the relief which plaintiff

seeks on his individual behalf and determining that a class action is not to be maintained."

Huff v. N. D. Cass Co.,
— F. Supp. —, 4
EDP ¶7833 (N.D. Ala. 1971),
aff'd — F. 2d —, 4
FEP Cases 741, 4 EPD ¶7775
(5th Cir. 1972)

In sustaining the District Court, the Court of Appeals ruled as follows:

"Huff's third (and most serious) objection is that he was required to prevail on his individual claim before being allowed to proceed with his class action. He says that this was reversible error under the teachings of Johnson v. Georgia Highway Express, 5 Cir., 1969, 417 F. 2d 1122, 2 FEP Cases 231. See, also, Miller v. Mackey International, Inc. 5 Cir., 1971, 452 F. 2d 424. This requires a most careful analysis of the procedure followed by the District Court in the instant case.

"In Johnson the District Court held that the former employee could not maintain his suit as a class action until he proved that he had been discharged because of race. It must be emphasized, however, that Johnson came to us on *interlocutory* appeal, not after witnesses had been heard and it had been determined as a matter of fact that Johnson was not a member of the purported class.

• • •

"By whatever label, and regardless of the theory upon which it proceeded, Huff has had a hearing. That hearing developed that he was not a member of the class which had any rights to be protected. He had not worked there for fifteen months at the time suit was filed. In the absence of an adjudication that he was entitled to reinstatement he had no prospect of going to work there again.

• • •

"In order to have standing to bring a class action, the class representative must first and foremost be a member of the class which he seeks to represent. Bailey v. Patterson, 1962, 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512; Hall v. Beals, 1969, 396 U.S. 45, 90 S. Ct. 200, 24 L. Ed. 2d 214; Hamer v. Campbell, 5 Cir., 1966, 358 F. 2d 215; Singleton v. Board of Comm'rs of State Institutions, 5 Cir., 1966, 356 F. 2d 771.

"Class actions of the type now in question have become one of the great instruments used by workers of a race, religion, sex, or national origin in gaining equal employment opportunities. Persons who lead such actions have come to be known as 'private Attorneys General.' If we were to remand the case to the District Court to allow Huff to lead an action on behalf of a class of which he was not a member we would sanction a 'sham' class action. This would not only destroy the dignity which has distinguished this type of action but it would likewise destroy the true role of the class action plaintiff.

"The action of the District Court in deciding the merits of Huff's individual claim, incidentally to a determination of his standing to pursue the class action as the only named plaintiff, does not erase the fact, shown by an evidentiary hearing, that Huff is not a member of the class he sought to represent, that is, one presently employed or who might thereafter be employed, and thus subject to the alleged discriminatory conduct of which he attempted to complain on behalf of others *similarly situated.*

'To be more specific, we recognize the difference existing between (1) requiring a class action plaintiff to proceed, and (2) first ascertaining if he is a member of the class he seeks to represent. No class action plaintiff has to prove in order to gain access to the courts that he will prevail on his individual complaint. He does have to show, when it is brought to issue under Rule 23, that he is a member of a class 'of those similarly situated' and that he can adequately represent it."

Huff v. N.D. Cass Co.,
— F. 2d —, 4
FEP Cases 741, 745, 746,
4 EPD ¶7775 (5th Cir. 1972)

There can be no doubt from the language quoted above that the Fifth Circuit would consider Brown's class action to be a 'sham' which would destroy the dignity and role of the true class action plaintiff. The direct conflict created by the decision of the Court of

Appeals for the Fourth Circuit in the instant case and the Court of Appeals for the Fifth Circuit in the *Huff* case requires resolution by this Court.

B. The Court of Appeals Decision Is In Direct Conflict With The Applicable Provisions Of The Civil Rights Act of 1964 And With The Rulings Of Other Courts of Appeals

The decision of the Court of Appeals to elevate one single head count, which reflected the black-white ratio as of one day — September 3, 1969 — to the status of insurmountable proof of racial discrimination in violation of the Civil Rights Act of 1964 cannot be justified upon any basis. It conflicts with the established appellate procedure that factual determinations made in the trial court are to be respected unless wholly unsupported in the record. It conflicts with the established principles announced by Courts of Appeals in other circuits dealing with the weight to be given to circumstantial statistical evidence. It defies the statutory language of the Civil Rights Act of 1964, which was never intended to require an employer to grant preference to any race or group because of a numerical imbalance of the races among its employees. And it defies all of the highly relevant facts which were judicially established by findings of the District Court, on the basis of uncontradicted direct evidence, and which were not disturbed on appeal.

1. The Single-Day Head Count Is Meaningless In Light Of All The Other Evidence In The Record

The only evidence presented by the plaintiff to establish his contention that a class of blacks had been discriminated against since July 2, 1965, the effective date of the Civil Rights Act of 1964, was the one head count of black-white employees in the various job categories as of September 3, 1969. The lack of other statistical evidence and the lack of any evidence whatsoever of qualified blacks being passed over for equally or less qualified whites to fill job openings cannot be excused on the basis that any such evidence was not accessible to the plaintiff. The plaintiff had over one year of discovery time and was granted full opportunity to analyze and evaluate all company personnel records. Yet he did not offer the trial court any evidence whatever, even by way of example, which would indicate unlawful discrimination against individual blacks or blacks as a group. The plaintiff failed to introduce statistical evidence of the ratios of black-white employees on any other dates. Thus, the single-day head count stands alone — and there is nothing in the record for it to be related to in terms of whether the number and dispersement of minorities was any greater or less at times previous or subsequent to September 3, 1969.

The Company offered direct evidence to support its theory that the single-day head count could not be used legally as the sole premise to support a conclusion that unlawful discrimination had been prac-

ticed. In addition, the Company proved that this head count did not purport to show the number of blacks who, in fact, had been offered jobs in the higher categories but who, for reasons of their own, had declined to accept, or who had accepted the offers to advance to higher jobs but who, for reasons of their own, had decided to return to their old jobs.

The Company's evidence that it made offers to blacks to accept or try-out on higher level jobs was not merely conclusionary or proof of isolated incidents. On the contrary, the testimony revealed numbers of specific instances where blacks had been offered such opportunities for advancement. It was upon the basis of this evidence that the District Court found that "a large number" of black employees were involved in this effort of the Company to advance them.

As a matter of law, the class action came to a dead end when, in approving the District Court's findings, the Court of Appeals stated:

> "Starting in the late 1950's, the company integrated its facilities, sports, and social functions. Since 1965 it has made affirmative efforts to recruit black workers as a part of its routine employment procedure, and it has provided opportunities for black employees to transfer into welder-fabricator or machine shop classifications. Some have accepted the transfers; others, after initially accepting, returned at their own request to lower paying jobs."
>
> (App. 6a)

Nothing more than that is, or could be, required by the Civil Rights Act of 1964.

It defies elementary logic and established legal procedures to require, as the appellate Court ordered, that the circumstantial inference in the one-day statistic sheet should override completely all of the contradicting facts which were established both by the district and appellate Courts. The trial Court considered and rejected that evidence in the fact finding process. Its decision was binding on appeal even though the reviewing Court might have ruled differently had it been acting as the fact finder.

> "[W]here an action is tried by a court without a jury 'findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' . . . There is no case more appropriate for adherence to this rule than one in which the complaining party creates a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses."
>
> *United States v. Oregon State Medical Society*, 343 U.S. 326, 322, 96 L. Ed. 978, 72 S. Ct. 690 (1952)

"It is beside the point that a reviewing court might draw opposite inferences favorable to the contentions of [the appellant]. That only would

not justify reversal of the present findings . . . Where a trial involves disputed factual issues a choice must always be made between opposing versions of the evidence. In this case the law imposed that high duty and responsibility upon the presiding judge. His preferred opportunity for just appraisement of the witnesses and fair comparison and evaluation of the evidence is recognized in the law's command that 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' . . . We cannot say that the findings are clearly erroneous. We are not 'left with the definite and firm conviction that a mistake has been committed'."

Remington Rand, Inc. v. Societe Internationale, 188 F. 2d 1011, 1013 (D. C. Cir. 1951).

2. The Remedy Imposed Upon The Company In The Decree Of The Court Of Appeals Directly Infringes Upon Rights Of The Company Which Are Expressly Protected By The Provisions Of The Civil Rights Act Of 1964

Advancement of this company's employees to higher paying jobs has always been accomplished and controlled through a system of periodic merit reviews which evaluate job performance, ability, attitude, in-

itiative, cooperativeness, dependability, reliability, and judgment of all employees. In its enactment of Title VII, Congress took great pains to see that employers would be fully protected in their right to maintain and operate such merit systems, the express provision being:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production . . . provided that such differences are not the result of an intention to discriminate because of race. . . ."
>
> 42 U.S.C. §2000e-2(h)

For a period of more than one year prior to the trial, the plaintiff had unlimited access, in discovery proceedings, to the company's personnel records. In the course of this, the plaintiff was supplied with the work histories of all company employees covering a period of approximately nine years. Yet, not one iota of direct evidence was introduced at the trial to show, or attempt to show, that there had been any racial discrimination, or intention to discriminate, against any class of minority employees in the operation and application of the company's merit system. The District Court found as a fact that, through operation of this merit system, the company has made genuine and

often successful efforts to upgrade its minority race employees. That finding was not disturbed on appeal.

In spite of all the foregoing, the Court of Appeals characterized the merit system as a "deficiency" in the company's employment policies, which ". . . *must give way* to objectivity if statistical indicia of discrimination are to be refuted" (Emphasis supplied) (App. 11a).

As has been noted, the Congress attached only one condition on the right of the company to advance employees through merit review, that is, a prohibition against an intention of the company to discriminate on account of race. The decree of the appellate Court substitutes an entirely different and much more stringent condition, namely, that even in absence of discrimination, the company may promote by merit review if, and only if, the result is a work force sufficiently balanced according to race throughout all job categories to satisfy the Court's own judgment as to what a proper balancing would be.

Standing alone, this contradiction or disregard by the Court of Appeals of the plainly stated mandate of Congress cries out for review and correction by this Court. Such review and correction is rendered more imperative by the remedy which the appellate Court seeks to impose upon the company. It directed that the case be remanded to the District Court for supervision by that Court of a reallignment in the racial balance of the work force, which the company was ordered to make.

Necessarily implicit in this is a requirement that such realignment be achieved by granting of preferences to minority employees. That is bound to be true because employment policies which, admittedly, were not discriminatory have not produced and maintained a racial balance acceptable to the Court of Appeals.

Thus, the remedy specified collides head on with the entire purpose of the Civil Rights Act of 1964. The Congress directed that hiring, promotion, etc. *shall not be* according to race. The Court of Appeals now directs that this company's hiring, promotion, etc. *shall be* according to race, and that such hirings and assignments shall continue indefinitely until the Court is satisfied with the degree of balancing.

That this is precisely the sort of thing that the Congress carefully sought to guard against is emphasized in the enactment that:

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer, . . . in comparison with the total number or percentage of person of such race, . . . in any community, State, section, or other area, or in the avail-

able work force in any community, State, section, or other area."

42 U.S.C. §2000(e)-2(j)

If any amplification of the meaning of that clearly stated statute is necessary or desirable, it is readily to be found in legislative history. In explaining this section of the Act, Senator Humphrey stated that:

"The proponents of this bill have carefully stated on numerous occasions that Title II does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group."

Legislative History of Titles VII and XI of Civil Rights Act of 1964, p. 3005 (published by United States Equal Employment Opportunity Commission)

Senators Clark and Chase, the floor managers of Title VII, explained that:

"... [A]ny deliberate attempt to maintain a racial balance whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race."

110 Cong. Rec. 7213 (1964) (Interpretive Memorandum of Title VII)

Senator Williams, also a major proponent of the enacted legislation, included in the record the statement that:

"An employer cannot be forced to discharge employees or employ additional employees in order to achieve a racial balance. An employer with 100 employees who may be all white cannot be required to meet a quota even though his plant is located in a neighborhood that is 50% Negro."

110 Cong. Rec. 14331
(1964) (Staff Memorandum,
Senate Judiciary Committee)

This Court has already confirmed that "Discriminatory preference for any group, minority or majoity, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 28 L. Ed. 2d 158, 164, 91 S. Ct. 849 (1971).

3. The Court of Appeals Decision That The Statistical Head Count Proved Post-Act Discrimination Is Directly In Conflict With The Rulings Of The Fifth Circuit And Other Federal Courts

In a case of this type, a plaintiff who relies upon naked statistics, which show a racial imbalance, to make out his class action necessarily seeks to have the court indulge in the purely speculative assumption that Negro employees were equally well qualified as white employees, and that they were available for the work in question, but were disparately denied job opportunities solely because of their race. In rejecting that contention in this case, the District Court fol-

lowed the precedents of all other courts which had been confronted with the problem.

In reversing the District Court here, not only did the Court of Appeals presume, contrary to all of the credited evidence, that the statistical imbalance resulted from a preference of white employees over equally qualified Negroes, it went much further. The Court held that in a case such as this, where the employer has no formal, *written* objective criteria for promotion which have been applied mechanically and without the exercise of independent judgment, *such presumption is irrefutable by any evidence whatever.*

This is in sharp and direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *United States v. Jacksonville Terminal Co.*, 451 F. 2d 418 (5th Cir. 1971). In all relevant respects, the facts and circumstances in that case were identical to those presented in the instant case. In rejecting the contention that racial imbalance created a presumption of racial discrimination, the Court in that case stated:

> ". . . Throughout their testimony, Terminal officials reiterated that post-Act initial job assignments were made freely and were based on qualifications, or merit.
>
> • • •
>
> "Rather than attempt to contradict this testimony by showing that qualifications were not job related or that whites were preferred over blacks possessing equal or superior qualifications, the Government chose to stand on statistics elucidating post-Act em-

ployment disparities. . . . Once Terminal officials proffered justifying explanations for their actions, the Government should have shown that stated policies and assignment realities did not coincide after July 2, 1965.

"To make such a showing, the Government must have proved that whites received job assignments denied blacks, that the jobs were available when the blacks applied, and that the blacks' qualifications were equal or superior to the hired whites.

". . . The Government, confronted by the Terminal's evidence, only feebly attempted to refute it. Thus, *having shunned the burden of augmenting its statistics*, the Government's challenge in this regard must fail." (Emphasis supplied).

United States v. Jacksonville Terminal Co., 451 F. 2d 418, 446, 447, 448 (5th Cir. 1971)

Surely the severe conflict among the circuits, as shown by these cases, merits review by this Court.

C. The Decree Of The Court Of Appeals Is In Conflict With Precedents Well Established By This Court And If Permitted To Stand Will Amount To An Obvious Denial To The Defendant Of Due Process Of Law

The company has had no trial in the District Court on the question of whether it unlawfully discriminated against the plaintiff in 1960, more than

one year before the complaint alleged that the company had engaged in such discrimination. The finding by the Court of Appeals that the company was guilty of unlawful discrimination at that time, raises crucially-important, far-reaching questions which should be settled by this Court.

1. The Statute, 42 U.S.C. §1981, Has No Application In Civil Rights Cases Involving Private Employment

As is noted in the dissenting opinion of Judge Dupree in this case, ". . . Section 1981 for the first one hundred years of its existence was construed to apply only to state action and not to affect dealings between private individuals . . ." App. 16a-17a), e.g.:

> "The protection of this section [42 U.S.C. §1981] has been held to extend to aliens as well as to citizens. Consequently, the section and the Fourteenth Amendment on which it rests in part protects 'all persons' against *state legislation* bearing unequally upon hem either because of alienage or color." (Emhasis supplied).
>
> *Takahaski v. Fish and Game Comm.*, 334 U.S. 410, 419-420, 92 L. Ed. 1478, 1487, 68 S. Ct. 1138 (1948)

See, also: *The Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 836, 3 S. Ct. 18 (1883); *Moose Lodge No. 107 v. Irvis*, — U.S. —, 32 L. Ed. 2d 627, — S. Ct. —, 40 L.W. 4715 (June 12, 1972).

As Judge Dupree further noted:

"The extension of Section 1981 to cover private employment contracts had its genesis in the celebrated case of Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968), a case decided over two years after this one was instituted and eight years after defendant's alleged violation of Section 1981. In holding that Section 2 of the Civil Rights Act of 1866 (now 42 U.S.C. §1982) barred racial discrimination by private individuals in the sale or rental of property, the Supreme Court in *Jones* rejected as dictum its previous pronouncements which had led to the general understanding of the scope of these statutes and expressly overruled Hodges v. United States, 203 U.S. 1, 27 S. Ct. 6, 51 L. Ed. 65 (1906), to the extent it suggested a contrary holding. With unerring logic the courts began treating this 'quickening of the statutory Lazarus' (Section 1982) as necessarily reviving its companion, Section 1981, and making it applicable to racial discrimination in purely private contracts of employment. Sanders v. Dobbs Houses, Inc., 431 F. 2d 1097 (5th Cir. 1970)."

(App. 17a)

Even though the District Court had not dealt with the question, the Court of Appeals here assumed, without discussion, that Section 1981 prohibits discrimination in private employment. In a very recent case, after tracing the legislative history and court precedents dealing with Section 1981, the District

Court for the Middle District of Alabama reached the conclusion that such section ". . . only prohibits 'state action' done 'under color of law,' . . ." *Cook v. The Advertiser Company, Inc.*, 323 F. Supp. 1212, 1217 (M.D. Ala. 1971) (Johnson, J.), affirmed on other grounds, 458 F. 2d 1119 (5th Cir. 1972).

The question of whether Section 1981 applies to private employment, especially in light of the comprehensive legislation under Title VII, as amended, presents a substantial, unsettled federal question, the resolution of which will have a substantial impact upon proceedings in the federal courts.

2. The Denial To The Defendant Of Due Process Of Law In The Decree Of The Court Of Appeals Is Abundantly Clear

Even if it should now be determined, in overruling of the precedents upon which the company was entitled to rely at the time, that Section 1981 prohibited racial discrimination in private employment, there still remains the important question of whether such new precedent should, or may lawfully, be retroactively imposed upon the company in this case. Even in cases where such new and different precedents have been applied to facts which have been fully and properly litigated, the retroactive application of a new precedent has not been favored. *Linkletter v. Walker*, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 173 (1965).

Of far greater significance here is the undeniable fact that, for the first time, at the appellate level, the

Court retroactively applied the new interpretation of Section 1981 to facts as to which there has been absolutely no litigation whatever. As has been noted, there is not one word in the complaint about the period from June 1960 to November 1961, and there was no litigation of the company's conduct during that time. There was no evidence whatever that a welder-trainee job, such as Brown said he sought, was available between June 1960 and November 1961, all of the evidence on that point being, to the contrary, that no such opening existed.

The defendant has had no opportunity to raise the defense presented by the obvious fact that any claim of violation of law during the 1960-1961 period was barred by the appropriate statute of limitations. Surely no fault can be attributed to the defendant for not having pleaded the statute of limitations, for counsel are never called upon to plead such a statute to a void in the allegations.

In declaring that "The district judge's findings establish that the company violated 42 U.S.C. §1981 by denying Brown a welding job because of his race from the time he applied in 1960 until he was employed as a welder-trainee in 1961" (App. 4a), the Court of Appeals was relying upon a purely background observation of the District Court that "Although Brown may have been originally denied a welding job because of race, that decision was reversed in 1961 by Hubert Craig" (App. 29a). But that speculative observation as to what *may* have happened prior to 1961

was certainly no finding of fact by the District Judge. Rather, it was only his manner of emphasizing that he had absolutely no obligation to consider what might have transpired prior to the date on which the complaint first alleged discrimination against the plaintiff and that whatever may have occurred in that earlier period, the non-discriminatory policy and practices were in effect during the period covered by the complaint.

It is doubtful that there would be any more obvious and fundamental denial of due process of law than that which is wrought by the action of the Court of Appeals in this case.

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."
>
> *Morgan v. United States,*
> 304 U.S. 1, 18, 82 L. Ed.
> 1129, 1132, 58 S. Ct. 773 (1938)

As Judge Dupree further noted in his dissenting opinion:

> "Here for instance, we have an employer who was voluntarily taking steps to eliminate racially-discriminatory employment practices long before the Civil Rights Act of 1964 was passed. But in spite of this forward-looking action, defendant is

told that it must respond in damages for something which was not even against the law at the time it was done."

(App. 21a)

D. The Command Of The Court Of Appeals That The District Court Require The Company To Pay The Attorneys' Fees Of The Plaintiff Is In Direct Contradiction Of Title VII And Works Such An Injustice As To Call For The Exercise Of This Court's Supervisory Jurisdiction

Title VII of he Civil Rights Act of 1964, Section 706, 42 U.S.C. §2000e-5, grants to the District Courts jurisdiction over employment discrimination suits brought under that Act and allows the Court the discretion to award to "the prevailing party" a reasonable attorney's fee as part of the costs. The statute vests this discretion as to attorneys' fees only in the trial court.

The statutory language is clear that the court has the discretionary authority to grant *or refuse to grant* attorneys' fees to the prevailing party. Certainly there would be strong compulsion for the trial court to exercise this discretion in favor of refusing such attorneys' fees in circumstances such as the present case, where the major portion of the plaintiff's claims have been rejected. It was burden enough to require the company to defend Brown's charges that he had been discriminated against. Although the company

prevailed on that issue, it received no reimbursement for its legal expenses.

No injunctive or other remedies have been imposed upon the company by the trial or appellate Courts in this case. It may be that none will ever be found to be appropriate.

Yet, despite all this, the Court of Appeals has made the mandatory declaration that the company must bear the entire costs and attorneys' fees of the plaintiff. Where the statute provides "discretion," the Court of Appeals has revoked it. According to the decree, where the company has prevailed on issues, its attornys' fees shall be denied, and where the plaintiff has failed to prove issues, his attorneys' fees must be paid by the defendant, who prevailed. Congress never intended such a result as that.

Federal statutes dealing with the award of attorneys' fees are of two types: (1) those with imperative or mandatory provisions, which state that attorneys' fees "*shall*" be awarded to the party bringing the suit, if he is successful;[1] and (2) those with permissive or discretionary provisions, which state that attorneys' fees "may" be granted to the prevailing party.[2]

The Title VII provision as to an award of attorneys' fees is, by its clear language, a statute of the second

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[1]See, *e.g.*, 15 U.S.C. §15; 47 U.S.C. §206; 29 U.S.C. §216(b).

[2]See, *e.g.*, 17 U.S.C. §116; 15 U.S.C. §77k(e); 15 U.S.C. 78i(e).

type. Established precedent interpreting statutes of the second category are clearly at odds with the Court of Appeals' pronouncement in this case that such a provision is mandatory in spite of all the circumstances. *Walker v. Wiar*, 276 F. 2d 39 (10th Cir. 1960); *Hoge Warren Zimmerman Co. v. Nourse & Co.*, 293 F. 2d 779 (2nd Cir. 1961); *Colgate-Palmolive Co. v. Carter Products, Inc.*, 230 F. 2d 855 (4th Cir. 1956); *Orrison v. Hoffberger Co.*, 190 F. 2d 787 (4th Cir. 1951); *McCraw v. United Ass'n. of Plumbing and Pipe Fitting Industry*, 341 F. 2d 705 (6th Cir. 1965):

The question presented with respect to attorneys' fees is of substantial magnitude. Its resolution will have wide impact and should be made by this Court.

CONCLUSION

Upon all that is herein set forth, the petitioner earnestly prays the Court for a Writ of Certiorari, directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which that Court has rendered in the present case.

Respectfully submitted,
WHITEFORD S. BLAKENEY
Attorney for the Petitioner

APPENDIX

OPINION OF THE COURT OF APPEALS

United States Court of Appeals
FOR THE FOURTH CIRCUIT

NO. 71-1268

Marvin W. Brown,
Appellant,

versus

Gaston County Dyeing Machine Company,
Appellee.

Appeal From the United States District Court
for the Western District of North Carolina,
at Charlotte. James B. McMillan, District Judge.

(Argued October 6, 1971 Decided March 28, 1972)

Before CRAVEN and BUTZNER, Circuit Judges, and DUPREE, District Judge.

Robert Belton, Charlotte, N. C. (J. LeVonne Chambers, Charlotte, N. C., Conrad O. Pearson, Durham, N. C., Jack Greenberg, William L. Robinson, New York City, and Chambers, Stein, Ferguson & Lanning, Charlotte, N. C., on brief), for appellant, and Brown Hill Boswell, Charlotte, N. C. (J. W. Alexander, Jr., Blakeney, Alexander & Machen, Charlotte, N. C., on brief), for appellee.

BUTZNER, Circuit Judge:

This is an appeal from the district court's dismissal of an individual claim and class action alleging racial discrimination in hiring, promotion, pay, and other terms and conditions of employment.[1] The suit is founded on Title VII, § 703(a) of the Civil Rights Act of 1964,[2] and 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866.[3] We modify the judgment concerning the individual claim, vacate the judgment

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[1]Brown v. Gaston County Dyeing Machine Co., 325 F.Supp. 541 (W.D.N.C. 1970). This case was previously here on appeal of the issue of exhaustion of remedies. Brown v. Gaston County Dyeing Machine Co., 405 F.2d 887 (4th Cir. 1968), cert. denied, Pilot Freight Carriers, Inc. v. Walker, 394 U.S. 918, 89 S. Ct. 1189, 22 L.Ed.2d 451 (1969).

[2]Section 703(a) of the Act, 42 U.S.C. § 2000e-2(a) (1970), provides:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[3]42 U.S.C. § 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

dismissing the action brought on behalf of the class, and remand the case for further proceedings.

I

The defendant, Gaston County Dyeing Machine Co., manufactures and installs custom-made machines for dyeing textile yarns or threads under high pressure. The machines, essentially large vessels weighing several tons with numerous fittings and connections, are assembled by welder-fabricators who must be able to read blueprints and weld to exacting tolerances. Welder-fabricators are among the company's best paid employees.

Marvin Brown, the individual plaintiff, claims that he was denied promotion to higher paying welder-fabricator classifications because he is black. The company counters that Brown was offered unfettered opportunity to advance, but that he lacked the ability and temperament to do the work required of him. Resolution of these conflicting claims depended largely upon the credibility of witnesses, and since the district judge's findings are supported by the evidence, they are binding upon us. Fed.R.Civ.P. 52(a).

In 1960, Brown, who had finished a welding course at North Carolina Agricultural and Technical College, was hired by the company for one of its lower paying jobs. The district judge found that

> "Brown asked for employment as a welder and was given to understand by supervisory people that it

was premature to try to place a Negro in a job as welder with the defendant.

"However, in 1961, [the company's president] instructed his plant managers to give Brown a job as a welder and try to help him make progress in that work. . . ." 325 F.Supp. at 542.

The president's directions were followed and Brown was promoted to welder-trainee. He then progressed through various steps to welder-fabricator, class B.

[1] The district judge's findings establish that the company violated 42 U.S.C. § 1981 by denying Brown a welding job because of his race from the time he applied in 1960 until he was employed as a welder-trainee in 1961. Brown, therefore, is entitled to back pay measured by the differences between the wages he would have earned had he been initially employed as a welder-trainee and his actual wages. Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971); Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), cert. denied, United Order of Am. Bricklayers and Stone Masons, Local 21 v. Waters, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970).

[2] The district judge, for reasons fully stated in his opinion, found that Brown was not a victim of racial discrimination after he was employed as a welder-trainee. This finding also depended largely upon the

credibility of witnesses. It, too, is supported by the record and is binding upon us. Since the finding covers the period Brown worked for the company after the effective date of the Civil Rights Act of 1964, he is not entitled individually to the relief he seeks under Title VII of the Act, and his remedy is limited to § 1981 for the earlier period.

II

[3] While Brown has not proved his own Title VII claim, the class of employees he represents is not for this reason deprived of a remedy. Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421, 428 (8th Cir. 1970); *cf.* Jenkins v. United Gas Corp., 400 F.2d 28, 31 (5th Cir. 1968). The district court, cognizant of this rule, considered the class action on its merits. Rejecting the company's claim that the evidence demonstrates no discrimination against minorities, the district court said, "[A]t least in prior years, welding and high pay in the defendant's shop were not for black men." 325 F.Supp. at 543. However, it found that the company, possibly spurred by this suit, had recently undertaken a number of measures to eliminate the racial discrimination it practiced in the past. Consequently, the court dismissed the action for lack of evidence to support relief for the class.

Although the company has employed black workers for many years in low paying jobs, it was not until 1961, when Brown was promoted to welder-trainee, that any had been assigned to welding. From 1958 to

1968, the company offered an after-hours training program for welding, blueprint reading, and shop math. Only one black employee was admitted to the program in that decade. For at least six years, it has employed three black leadmen, but these three are paid less than other leadmen who are white. The company advertises that it is an "equal opportunity employer," but it has no objective, formal guidelines for hiring, promotion, and transfer, or for giving notice of vacancies within the plant except by word of mouth.

Starting in the late 1950's, the company integrated its facilities, sports, and social functions. Since 1965 it has made affirmative efforts to recruit black workers as a part of its routine employment procedure, and it has provided opportunities for black employees to transfer into welder-fabricator or machine shop classifications. Some have accepted the transfers; others, after initially accepting, returned at their own request to lower paying jobs.

The district court found that Gaston County where the defendant's plant is located, has a black population of approximately 13 percent. In September 1969, black employees constituted less than ten percent of the defendant's total work force. As of the same date they comprised approximately 13 percent of the hourly rate production employees, but this percentage had slipped to less than 11 percent by the time of the trial in October 1970. The following table shows employment by race in each of the company's job classifica-

tions of hourly rate production employees as of September 1969:

JOB CLASSIFICATION	HOURLY WAGE RANGE	No. of Employees in Each Category by Race BLACK	WHITE
Machine Erector	$2.21-3.81	—	9
Inst. Test Technician	3.02-3.47	—	—
Electronics Technician	2.78-3.47	—	2
Layout and Leadman	2.35-3.47	3	5
Control Panel Technician	2.91-3.36	—	1
Machine Specialist	2.91-3.36	—	2
Fabrication Specialist	2.91-3.36	—	1
Machine Builder	2.78-3.36	—	12
Pump Builder	2.54-3.36	—	2
Laboratory Machine Builder	2.12-3.36	—	2
Maintenance Mechanic	1.60-3.36	—	3
Welder-Fabricator, Class A	2.92-3.25	—	19
Machinist, Class A	2.81-3.25	—	20
Press Brake Operator	1.60-3.25	—	3
General Fabricator	1.60-3.25	—	4
Marvel Saw Operator	1.60-3.08	—	1
Instrument Bldr., Class A	2.65-3.05	—	2
Control-Panel Assembler			
Class A	2.65-3.05	—	4
Class B	1.60-2.64	—	10
Welder-Fabricator, Class B	2.24-2.91	—	23
Power Shear Operator	1.60-2.87	—	2
Radial Drill Press Operator			
Class A	2.41-2.82	—	3
Class B	1.60-2.40	—	—

JOB CLASSIFICATION	HOURLY WAGE RANGE	No. of Employees in Each Category by Race	
		BLACK	WHITE
Machinist, Class B	2.18-2.80	1	9
Shipping and Receiving Clerk	1.60-2.80	—	6
Machine Operator	2.07-2.71	—	5
Dye Spindle Bldr.	1.60-2.67	—	3
Forming-Press Operator	1.60-2.67	—	—
Stockman	1.60-2.67	—	6
Instrument Bldr., Class B	1.60-2.64	—	2
Painter	1.60-2.64	2	—
Sandblaster	1.60-2.58	4	—
Polisher-Finisher	1.60-2.58	1	—
Pump Bldr. Trainee	1.60-2.53	—	—
Carpenter-Crater	1.60-2.52	—	2
Truck Driver	1.60-2.52	2	2
Grinding and Pickling Optr.	1.60-2.35	6	1
Materials Handler	1.60-2.35	1	3
Maintenance/Industrial Clean up	1.60-2.35	6	1
Machine Operator Trainee	1.60-2.27	—	—
Welder—Fabricator Trainee	1.60-2.23	1	13
Machinist Trainee	1.60-2.17	—	—
Maintenance-Office	1.60-2.13	2	—
Watchman	1.60-2.13	—	—
General Helper	1.60-2.13	—	4
TOTALS		29	187

Analysis of these statistics shows that of the 45 job classifications, black workers are employed in only 11. Slightly less than half of these employees are relegated to two positions, grinding and pickling, and industrial maintenance (janitors). Both of these jobs are rated near the bottom of the company's pay scale, and neither affords employees much opportunity for advancment to higher paid positions. Significantly, both of these classifications are almost completely segregated. Each has six black employees and only one white employee. Sandblaster is the classification of another comparatively low paying job, and it, too, is filled by black employees. In contrast, although 55 persons are employed in welding jobs, only one is black. And in the top 18 classifications having a pay range exceeding $3.00 an hour, there are 102 white and three black employees. But even these three, who are classified as leadmen, receive less than $3.00 an hour while their white counterparts are paid at a rate in excess of $3.00.

[4] Courts have often observed that proof of overt racial discrimination in employment is seldom direct. *E. g.*, United States v. Jacksonville Terminal Co., 451 F.2d 418, 442 (5th Cir. 1971); Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157, 1162 (8th Cir. 1971); Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954). Recognizing this, we have found "error in limiting Title VII to present specific acts of racial discrimination," United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970), and it is now well established that courts must also

examine statistics, patterns, practices and general policies to ascertain whether racial discrimination exists. United States v. Jacksonville Terminal Co., 451 F.2d 418, 442 (5th Cir. 1971); Graniteville Co. v. EEOC, 438 F.2d 32, 41 (4th Cir. 1971); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970); United States v. Hayes International Corp., 415 F.2d 1038, 1044 (5th Cir. 1969). We need not decide whether the 1969 statistics, revealing as they are, should be regarded as conclusively showing violation of Title VII or whether they establish a prima facie case.[4] It is sufficient to hold that they have not been rebutted by the company's efforts since 1965 to hire and promote black employees.

In United States v. Bethlehem Steel Corp., 446 F.2d 652, 655 (2nd Cir. 1971), the court identified the lack of "fixed or reasonably objective standards and procedures for hiring" as a discriminatory practice. Gas-

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[4]*Compare* Parham v. Southwestern Bell Telephone Company, 433 F.2d 421, 426 (8th Cir. 1970) (statistics as a matter of law establish a violation of Title VII), *with* Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 945, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971) (statistics create a prima facie case of discrimination). *See* Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1154 (1971).

ton's employment policies suffer the same deficiency. The company lacks objective guidelines for hiring, for pay increases within job classifications, and for promotion or transfer from one job to another. Employment and promotion policies that operate without objective standards for the direction of supervisory personnel may appear impartial, but recently we cautioned: "Practices, policies or patterns, even though neutral on their face, may operate to segregate and classify on the basis of race at least as effectively as overt racial discrimination. Particularly is this so if a history of past discrimination is developed." United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970). Elusive, purely subjective standards must give way to objectivity if statistical indicia of discrimination are to be refuted. "Far from disparging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." Griggs v. Duke Power Co., 401 U.S. 424, 436, 91 S.Ct. 849, 856, 28 L.Ed.2d 158 (1971).

Here, in the absence of objective criteria applied to all workers alike, the statistics indicate that race is the only identifiable factor explaining the disparity between the jobs held by white employees and those held by black employees. The proof discloses no objective standards based on education, experience, ability, length of service, reliability, or aptitude to account for the preferential employment of white workers. *Cf.*

United States v. Jacksonville Terminal Co., 451 F.2d 418, 449 (5th Cir. 1971).

Moreover, the record discloses that notices of vacancies are not posted, and news of them is passed along by word of mouth. When job classifications are as segregated as they are in this company, delay in learning about a vacancy in an all white category may in itself discriminate against a black employee who hears of it only after it has been filled. This practice resembles the lack of a formal transfer system which we criticized in *Dillon*. 429 F.2d at 802, 804. It differs little from a hiring policy of referral by employees that has been condemned because it favors the family and friends of white employees over black job seekers who have no way of knowing about an opening. Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir. 1970); United States v. Sheet Metal Workers, Local 36, 416 F.2d 123, 137 (8th Cir. 1969); *see* Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1152 (1971).

[5] In sum, the lack of objective guidelines for hiring and promotion and the failure to post notices of job vacancies are badges of discrimination that serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the company's work force.

III

The district court was impressed with the efforts of the company to remedy the discrimination of prior

years. Counsel for the plaintiff, though pressing for full injunctive relief, candidly acknowledges that the company has recently improved many of its practices. But the transition to a shop free from discrimination is as yet incomplete. Progress already made has chiefly occurred since the institution of this suit. If this litigation is prematurely terminated, members of the class run the risk that this progress will abruptly end. Therefore, we will adopt the remedy fashioned in Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 428 (8th Cir. 1970), which the plaintiff somewhat reluctantly proposes as an alternative measure. There the court of appeals directed the district judge to retain the case on his docket a reasonable time to insure continuance of the company's policy of equal employment opportunities.

Accordingly, the case is remanded to the district court for retention on its docket for a reasonable time. If, at the end of this period, the court finds that the company's employment policies have completely eliminated the unlawful practices prohibited by § 703(a), it may dismiss this action. However, if any unlawful employment practices remain, the court must order appropriate injunctive relief. In either event, the plaintiff is entitled to recover his costs and reasonable counsel fees. Robinson v. Lorillard Corp., 444 F.2d 794 (4th Cir. 1971); Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971); *Parham, supra,* 433 F.2d at 429.

The judgment is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

DUPREE, District Judge (concurring in part, dissenting in part):

On the basis of a district court finding that plaintiff Brown upon asking defendant for employment as a welder was told "that it was premature to try to place a Negro in a job as a welder with the defendant" the majority opinion rules that defendant violated a century-old civil rights statute, 42 U.S.C. § 1981, and thereby became liable to the plaintiff as a matter of law for back pay from the time of his initial employment in 1960 until he was given a job as a welder-trainee in 1961. I believe this result is not commanded by this statute and that in any event the decision should not be made in this court. I therefore respectfully dissent from this part of the majority opinion and in view of the far-reaching consequences of the decision in this rapidly-developing area of the law, I feel that my opposing views should be recorded.

For purposes of discussion I will assume that the evidence supported and the district court made a positive finding of racial discriminaton by defendant against the plaintiff prior to his employment as a welder-trainee in 1961.[1] I agree with the majority that

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[1]Actually, the evidence was not all one way on this point. The plaintiff, Marvin Brown, son of a long-time Negro employee of the defendant company, began working for defendant during vacation time while he was still in high school. Hubert Craig, Sr., the company's president and owner, took a special interest in the plaintiff, encouraged him to go to college and helped finance a two-year welding course for him at A & T College in Greensboro, North Carolina. Upon

the evidence amply supported the district judge's findings that thereafter defendant did not discriminate

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completion of this course plaintiff returned to Gastonia and went to work full-time for defendant in June, 1960. He asked for employment as a welder, a job which paid more money, but the record is not clear as to whether there were any such jobs open at the time. Plaintiff also asked to be allowed to take a basic welding course offered by the company, and he complained when defendant's plant manager failed to make room for him to take the course. The manager explained that only elementary welding and shop math were taught in the course and that plaintiff had already successfully completed these courses in his college training.

Later the defendant's president again intervened on his behalf and instructed the plant manager to give plaintiff the first welder-fabricator trainee job that came open. This was done and arrangements were made for defendant's best instructor in welder-fabricating to teach plaintiff this highly-skilled work. Defendant's personnel director was instructed to follow plaintiff's progress and to make sure he was given opportunity to improve and receive merit raises as he became qualified.

Brown worked for defendant about four and one-half years during which time he progressed "at least as good as average among the welders in the plant" and qualified for thirteen pay raises. His work was not always of acceptable quality, however, and there was evidence of friction between him and defendants supervisory personnel from time to time. Finally he quit his job voluntarily in January, 1966, and he instituted this suit on May 31, 1966.

After leaving defendant's employment plaintiff took a welding job with another company, but was later fired because of poor quality work, refusal to follow instructions, and disobedience of instructions. The picture emerges of a malcontent who experienced difficulty in adjusting to the requirements of employment quite apart from any racially-discriminatory policies of his employer. The district court so found. 325 F.Supp. 541, 543 (1971).

against the plaintiff and that plaintiff's claims under Title VII of the Civil Rights Act of 1964 were properly rejected. But I seriously question whether the court-fashioned remedy of back pay should be inexorably employed in a Section 1981 case involving racial discrimination in employment which occurred prior to the enactment of Title VII. I think there are compelling reasons why it should not be so used.

Cited by the majority in support of the back pay award in this case are two cases from the Fifth Circuit and one from the Seventh.[2] These cases hold that Section 1981 affords a right to sue for "private" racial discrimination in employment and that this right was not repealed by the enactment of Title VII of the Civil Rights Act of 1964. Other courts have reached the same conclusion.[3] None of these cases involved an award of back pay for a violation of Section 1981 which occurred prior to Title VII, however, and diligent research has failed to unearth such a case. Since Section 1981 for the first one hundred years of its existence was construed to apply only to state action

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[2]Boudreaux v. Baton Rouge Marine Contracting Company, 437 F.2d 1011 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970); cert. denied, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971); and Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970), cert. denied, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970).

[3]See, for instance, Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3rd Cir. 1971); Tolbert v. Daniel Construction Company, 332 F.Supp. 772 (D.S.C. 1971); Jamison v. Olga Coal Co., 335 F.Supp. 454 (S.D.W. Va. 1971).

and not to affect dealings between private individuals, this paucity of precedent is readily understandable.

The extension of Section 1981 to cover private employment contracts had its genesis in the celebrated case of Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), a case decided over two years after this one was instituted and eight years after defendant's alleged violation of Section 1981. In holding that Section 2 of the Civil Rights Act of 1866 (now 42 U.S.C. § 1982) barred racial discrimination by private individuals in the sale or rental of property the Supreme Court in *Jones* rejected as dictum its previous pronouncements which had led to the general understanding of the scope of these statutes and expressly overruled Hodges v. United States, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (1906), to the extent it suggested a contrary holding. With unerring logic the courts began treating this "quickening of the statutory Lazarus" (Section 1982) as necessarily reviving its companion, Section 1981, and making it applicable to racial discrimination in purely private contracts of employment. Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970).

As indicated, this court is the first one to apply the new rule retrospectively in a back pay claim. The result is that the defendant is required to pay damages for conduct which was not unlawful under the law as it existed at the time of the alleged wrong—a liability which the most learned attorneys would not have been able to counsel defendant against at the time. While

the court undoubtedly has the power to give retroactive effect to an overruling decision[4] (which *Jones* effectively was in this context), I think to do so in this case works an unnecessary injustice.

It must be remembered that the federal statutes prescribe no specific remedies for violations of the Civil Rights Act of 1866. Thus the courts in the exercise of their equitable powers are left to "fashion" their own remedies. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969). But surely this power to order a defendant to pay wages for a job never performed includes the power to exempt from such liability an employer who was not in violation of any known law at the time the alleged liability was being incurred.

At the very least the case should be remanded to the district judge for the purpose of determining whether in his discretion the new law should be applied retroactively to award the plaintiff in this case back pay.[5]

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[4]See Legg's Estate v. Commissioner of Internal Revenue, 114 F.2d 760, 764 (4th Cir. 1940). The rule is subject to several exceptions. It has been held not to apply in cases where there has been justifiable reliance on decisions which are subsequently overruled and those who have so relied may be substantially harmed if retroactive effect is given to the overruling decision; where the purpose of the overruling decision can be achieved without giving it retroactive operation; or where retroactive operation might greatly burden the administration of justice. Annot., 10 A.L.R.3d 1371. I think all of these exceptions are applicable here.

[5]There is nothing in the opinion of the district judge to indicate that he considered the possible applicability of Sec-

Authority for this position is to be found in a decision of this court just published, Tillman v. Wheaton-Haven Recreation Association, Inc., 451 F.2d 1211 (4th Cir. 1971). In that case Chief Judge Haynsworth, while recognizing that the Civil Rights Act of 1866 was not impliedly repealed by the enactment of the Civil Rights Act of 1964, applied the salutary principle of statutory construction that where two statutes relate to the same thing they must be read as together constituting one law and should be harmonized and effect given to each, if possible. The private club exception in the public accommodations section of the 1964 Act was held to operate as an exception to the Act of 1866 as well.

And so it is here. The 1964 Act makes an award of back pay discretionary with the trial court.[6] In order

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tion 1981 to this case. It is not likely that the question was even raised, for at the time the case was tried, only the *Waters* case from the Seventh Circuit had been decided, and it was then pending in the Supreme Court on petition for certiorari. The Fifth Circuit cases of *Boudreaux* and *Sanders* had not been decided. The question seems to have been raised for the first time in plaintiff-appellant's brief filed in this court and defendant apparently did not deem the point of sufficient merit to warrant a response in its brief.

[6] 42 U.S.C. § 2000e-5(g) reads in part as follows:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring

Continued, Next Page

to harmonize this provision with the construction now being placed on Section 1981 it should be held to operate as a limitation on that statute and to vest in the district court the power to award or withhold back pay in its sound discretion. In this view it may fairly be said that the district judge has already exercised his discretion to deny this plaintiff back pay under Section 1981, and his judgment in this respect should be affirmed.

Additionally, if Section 1981 is to be given retroactive effect, then in fairness it seems to me that the defendant should be allowed to move for leave to amend its answer to plead the statute of limitations, and this motion, too, would be addressed to the discretion of the district judge.[7]

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of employees, *with or without back pay* . . ." (Emphasis added.)

In addition, Title VII contains provisions for conciliation through EEOC and certain time limitations. An award of attorneys fees is made discretionary. One court has already held that the provisions of Title VII may be intentionally bypassed by a Section 1981 plaintiff. Caldwell v. National Brewing Company, 443 F.2d 1044 (5th Cir. 1971). If this be the law, one wonders if any future plaintiff will bother to comply with the ritual prescribed by Title VII where limitless relief is available under Section 1981.

[7]In view of the state of the law at the time the action was instituted defendant's failure to plead the statute initially is excusable. Plainiff's claims under Title VII were clearly not barred, and Jones v. Alfred H. Mayer Co. which gave rise to the change in the law with respect to Section 1981 claims had not been decided.

Since there is no federal statute of limitations prescribed for claims under Section 1981, the law of North Carolina

Finally, if the result reached by the majority is permitted but not required by the law as now construed, I think this is not a case in which this court or the district court should exercise a discretion to award this plaintiff back pay. In the few short years the Civil Rights Act of 1964 has been in effect much progress has been made in achieving its laudatory objectives. Some of this is the result of coercive court orders, but voluntary action of employers acting in good faith to eradicate the longstanding evils which existed prior to the statute have played a tremendous part in this progress. Here, for instance, we have an employer who was voluntarily taking steps to eliminate racially-discriminatory employment practices long before the Civil Rights Act of 1964 was passed. But in spite of this forward-looking action, defendant is told that it must respond in damages for something which was not even against the law at the time it was done. It may be that this approach will encourage voluntary action and a softening of the racial prejudices responsible for preexisting inequities in employment. With all deference I suggest the contrary as being more accordant with reality. The concept of concilia-

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would apply. 42 U.S.C. § 1988. Whether this would be the three-year statute, N.C.G.S. 1-52(2), or the ten-year statute, N.C.G.S. 1-56, poses an interesting question as to which I express no opinion. See Lazard v. Boeing Co., 322 F.Supp. 343 (E.D.La.1971). The claim would be barred under the three-year statute, but if the ten-year statute applies, the floodgates will be open to suits under Section 1981 in North Carolina on claims some of which may antedate Title VII by as much as three years.

tion which pervades Title VII should also be engrafted on Section 1981. See Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3rd Cir. 1971). Courts should be slow to employ harshly coercive remedies in cases where, as here, there has been an honest effort on the part of an employer to eliminate discriminatory employment practices and no current violation of any law has been found.

I concur in the majority opinion insofar as it rejects plaintiff's Title VII claims and directs retention of jurisdiction of the class action claim for a reasonable time.[5] I respectfully dissent from that part of it which awards plaintiff back pay under 42 U.S.C. § 1981.

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[5]I should say that with respect to the class action aspect of the case I question whether this plaintiff who voluntarily terminated his employment with defendant over six years ago is qualified to represent the class under Rule 23(a) F.R.C.P., but this court has previously found similar changes in a plaintiff's employment status not to moot the case for the class. Graniteville Co. v. EEOC, 438 F.2d 32 (4th Cir. 1971). Other courts have ruled similarly. Tipler v. E. I. duPont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971); Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969).

In view of the express language of 42 U.S.C. § 2000e-5 (k) authorizing the award of attorneys fees in the discretion of the court I likewise have some reservations about the court's holding that plaintiff is entitled to attorneys fees as a matter of law. But here again this court seems to have construed the statute to make the award of attorneys fees mandatory. Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971).

ORDER OF THE COURT OF APPEALS

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 71-1268

MARVIN W. BROWN,

Appellant,

-v-

GASTON COUNTY DYEING MACHINE COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James D. McMillan, District Judge.

ORDER DENYING REHEARING EN BANC

Upon consideration of the petition for rehearing en banc, the court having been polled, and a majority having voted to deny the petition;

It is ADJUDGED and ORDERED that the petition is denied.

JOHN D. BUTZNER
United States Circuit Judge

Filed: May 22, 1972

OPINION AND ORDER OF THE DISTRICT COURT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

Civil Action No. 2136

MARVIN BROWN,

Plaintiff,

-vs-

GASTON COUNTY DYEING MACHINE COMPANY, a North Carolina Corporation,

Defendant.

OPINION AND ORDER

ROBERT BELTON, Chambers, Stein, Ferguson & Lanning, 216 West Tenth Street, Charlotte, North Carolina 28202, counsel for plaintiff.

BROWN HILL BOSWELL, Blakeney, Alexander and Machen, 1410 North Carolina National Bank Building, Charlotte, North Carolina 28202, counsel for defendant.

Before JAMES B. McMILLAN, District Judge

Marvin Brown, the plaintiff, a Negro now in his early thirties, filed suit on May 31, 1966, against Gaston County Dyeing Machine Company of Gastonia, North Carolina, alleging that he and other Negroes similarly situated were subjected to racial discrimination in matters of employment, classification, wages, promotion and other incidents of employment. The complaint alleges violations of 42 U.S.C., § 1981 and § 1983, and violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C., § 2000e *et seq.* which became effective July 2, 1965. After several pre-trial conferences and extensive discovery and several abortive trial settings the case was tried on its merits on September 29 and 30 and October 1, 1970.

The defendant manufactures and installs dyeing machines. These are pressure vessels which are used in textile dye plants to dye various kinds of yarn (or threads) which are thereafter used for weaving cloth. A dyeing machine will receive a roll of yarn perhaps a foot or two in diameter and several feet long and will subject this yarn inside a heavy closed steel cylinder to liquid dye under considerable pressure so that the dye can penetrate all the fibers in the roll of yarn. These pressure tanks may weigh several tons; they are serviced by incoming and outgoing pipes of various kinds; and they have to stand hydraulic pressures without leaking. The lids and other portions are massive. The holes and projections for attachment to surrounding structures must be precisely made and located. The heavy lids must be properly balanced and

attached. The foundations must be correctly welded and positioned and the various pipe connections and valves must be accurately machined and welded.

Welding is a major part of the process.

The assembly of the machines is done ordinarily by welder-fabricators who, in order to do this work, must have the skills of good welders and must also be able to read and follow blueprints and to weld to close tolerances. The positioning of the various parts and fittings of a dyeing machine relative to other parts requires care, patience and skill. The process of assembling the dyeing machine and of boring holes in it and attaching fittings and positioning the various parts in proper relationship to each other is called "fabricating."

The welder-fabricators and supervisors receive top wages in the company.

As of September 5, 1969, the defendant employed approximately 215 hourly-paid production workers (see plaintiff's Exhibit 14) in 44 job classifications. Of these hourly-paid production employees, approximately 27 (13% of the total) were black. Black persons comprise about 13% of the population of Gaston County. As of September, 1969, there were no black employees in thirty-four (34) of the 44 job classifications. Except for three black employees in the "Layout and Leadman" category (wage range $2.35 to $3.47) the black employees are, for the most part, engaged in lower paying jobs such as "Grinding

and Pickling," "Industrial Maintenance" and "Sandblaster." Of the approximately fifty-five (55) employees working in the "Welder-Fabricator" category on September 5, 1969, only one was black.

The defendant has no written guidelines for initial employment nor for advancement nor for wage increases. Notices of vacancies are not posted. Employees are notified of vacancies through personal contact. Wage increases are based on merit. Company supervisors and foremen initiate recommendations for wage increases.

The defendant maintained a welder training program on its premises from 1958 to 1968. The courses offered have run from sixteen (16) to forty (40) weeks. The defendant had exclusive control and discretion to determine the participants in this program. No black employees participated in the welder training program until about 1968. No black persons were employed as welders at any time before the plaintiff was so employed in 1961.

The non-white population of Gaston County is about 13%. There are no data on the numbers of black people trained or capable to work as welder in the job market, and no data on the proportions of black and white adults in the job market.

Trained people are in demand in Gaston County; the unemployment rate for all labor is very low, and has in recent years been as low as ¾ of one per cent.

Marvin Brown worked for the defendant part time for several months in 1959. His father and several

other relatives worked there. He became interested in welding. Hubert Craig, president of the defendant, helped him go to school at A & T College in Greensboro where he learned basic welding and blueprint reading in two years of post-high school training. When Brown finished the welding course at A & T College he was given a job in 1960 with the defendant doing "pickling and grinding." This was a finishing-up type of job involving treating and smoothing the metal surfaces of work that had been welded or assembled by others. Brown asked for employment as a welder and was given to understand by supervisory people that it was premature to try to place a Negro in a job as welder with the defendant.

However, in 1961, Hubert Craig instructed his plant managers to give Brown a job as a welder and try to help him make progress in that work. From November of 1961 until he stopped working for the defendant a little over four years later in January, 1966, he progressed from welder-trainee at $1.15 an hour to Welder-Fabricator "B" at $1.90 an hour, which was about the midpoint of the range ($1.68 to $2.15) then in effect for welders of his classification. As a welder he did satisfactory work, with apparently no more than the usual number of errors.

Brown contends that he was denied promotion to higher classification and higher pay; that he was denied a chance to attend the local welding school; that white people, of no greater experience and ability than he, were sent to welding school and promoted

ahead of him; and that all these acts and patterns of discrimination were because of his Negro race.

Based upon the evidence, the court is not able to find nor interpret the facts as plaintiff contends. Although Brown may have been originally denied a welding job because of race, that decision was reversed in 1961 by Hubert Craig. Although Brown was not sent to the local welding school, the reasons were that Hubert Craig had already helped send him to A & T College where he had at least as much training in welding and blueprint reading as he could get locally; attending the local school was not a condition precedent to advancement. Although some white employees progressed faster than Brown, there were valid reasons (for example, eight more years of welding experience in the case of James Dawes, and greater skill and adaptability on the part of others) shown for the differences; and there were other white welders who made *less* progress than Brown. Brown's progress in fact was at least as good as average among the welders in the plant.

The most important elements in the situation, however, were a group of intangible factors which hampered Brown in achieving the full capacity, skill, accuracy and flexibility which a welder-fabricator assembling high-cost machines should have. He was apparently convinced from the first that he was being discriminated against because of his race. When he received correction or suggestion, he usually attributed it to racial bias. He testified that in his four years of

welding he never made a mistake! He was more intent on justifying the past than on improving for the future. He frequently went over the heads of his supervisors to take his troubles to Hubert Craig, the company president. He did not accept nor profit from supervision. He was not careful about routine company procedures.

The intangibles discussed above are easy to recite and could be a cloak for racial discrimination—and they have been scrutinized by the court with those possibilities in mind. After hearing the numerous witnesses and after observing and hearing the plaintiff the court is of the opinion, however, that they are legitimate and factual and that they, rather than race, account for any failure of the plaintiff to outstrip the most capable of his white competitors.

As to the class action, there are statistics and some testimony which show that, at least in prior years, welding and high pay in the defendant's shop were not for black men. On the other side of the ledger are a number of facts which should be considered. All company functions, on and off the premises, have been desegregated for a decade or so. Brown himself was employed in 1961 to be a welder and his advancement was encouraged. When the Civil Rights Act took effect in 1965, the policy was announced that the Act would be observed. Advertisements for welders for at least two years have been without regard to race. Since 1965, defendant has made genuine and often successful efforts to recruit black workers for the higher paid

welding jobs, and have offered promotional transfers to black employees. Some have accepted those transfers and gone ahead; a larger number have tried the welder-fabricator life and then abandoned it for more familiar and less exacting tasks.

It may be that this suit has been a spur of sorts to motivate the defendant in its recent efforts to recruit black welders and to promote black employees to higher paying jobs. Such motivation if it exists does not impart impropriety to defendant's actions, nor entitle plaintiff to relief not supported by the evidence.

ORDER

All claims for relief are denied; and the action is dimissed. No costs will be assessed.

This the 31st day of December, 1970.

/s/ JAMES B. McMILLAN

James B. McMillan
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-293

GASTON COUNTY DYEING MACHINE COMPANY,

Petitioner

v.

MARVIN W. BROWN.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM CALLING THE COURT'S ATTENTION TO PERTINENT NEW MATTERS

As was noted in the Petition for Certiorari, filed in the above-entitled case, on August 21, 1972, the Court of Appeals for the Fourth Circuit ruled that the plaintiff was a proper representative of a class of black employees or prospective employees of the Company, notwithstanding that he had voluntarily resigned his employment four months before the institution of this action and does not seek reinstatement of employment with the Company. It was further pointed out in the Petition that such decision on the part of the Court of Appeals in this case is in sharp and direct conflict with the decision of the Court of Appeals for the Fifth

Circuit in *Huff v. N. D. Cass Co.*, — F. Supp. —, 4 FEP Cases 740, 4 EPD ¶7833 (N.D. Ala. 1971), aff'd. — F. 2d—, 4 FEP Cases 741, 4 EPD ¶7775 (5th Cir. 1972).

On July 18, 1972, in an order which was not available to the Petitioner until after the Petition for Certiorari was filed herein, the Court of Appeals for the Fifth Circuit granted a petition for rehearing in the *Huff* case. That Order, so far as can be determined, has not yet been printed, either in the official or unofficial reports. For the convenience of the Court, such Order is printed as an Appendix hereto.

In the growing conflict among the circuits over the crucially important question involved, the Court of Appeals for the Sixth Circuit, in *Heard v. Mueller Co.*, has now ruled precisely as the Court of Appeals for the Fifth Circuit ruled in the *Huff* case. The decision of the Court in the *Heard* case has not yet been printed in the official reports, but is unofficially reported at 4 FEP Cases 1119, and 4 EPD ¶7904.

In the *Heard* case, the Court stated:

"In deeming the motion moot, the District Court was apparently relying upon the fact that the appellant, at the time of the filing of the motion, was no longer an employee of the Mueller Company nor a member of the Steelworker bargaining unit, and therefore was not a proper representative of the class of affected employees which he sought to represent. The appellant does not complain of his discharge, nor does he seek reinstatement. The Fifth Circuit

has recently held that a discharged employee who is not entitled to reinstatement and who had no prospect of returning to work there was not a proper representative of the class of black employees or prospective employees of that company. Huff. v. N. D. Cass Co., —F. 2d—, 4 FEP Cases 741 (5th Cir. 1972). We agree with the Fifth Circuit that:

> 'If we were to remand the case to the District Court to allow [the appellant] to lead an action on behalf of a class of which he was not a member we would sanction a "sham" class action. This would not only destroy the dignity which has distinguished this type of action but it would likewise destroy the true role of the class action plaintiff.' Huff v. N. D. Cass Co., supra, at —."
>
> 4 FEP Cases at 1122, 4 EPD at 6355-6356

It seems obvious that the crucial question presented in these cases will reoccur in the lower courts at a rapidly increasing rate, and that the serious uncertainties which are raised by the widening conflict among the circuits with respect to it will multiply, until the matter is resolved by a decree of this Court on review.

Respectfully submitted,
WHITEFORD S. BLAKENEY
Attorney for the Petitioner

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 71-2842

BRISCO HUFF, on behalf of himself and others similarly situated,

Plaintiff-Appellant

vs.

N. D. CASS COMPANY OF ALABAMA,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

ON PETITION FOR REHEARING AND PETITION FOR REHEARING IN BANC

(Opinion April 24, 1972, Fifth Circuit 1972, —F. 2d—)
(July 18, 1972)

Before, Brown, Chief Judge, Wisdom, Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold, Dyer, Simpson, Morgan, Clark, Ingraham, and Roney, Circuit Judges.*

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*Judge Gewin did not participate in the consideration of the petition for rehearing in banc.

By the Court:

A member of the Court in active service having requested a poll on the application for a rehearing in banc and a majority of the judges in active service having voted in favor of granting a rehearing in banc,

IT IS ORDERED, that the cause shall be heard by the Court in banc with oral argument on a day hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-293

GASTON COUNTY DYEING MACHINE COMPANY,

Petitioner,

v.

MARVIN W. BROWN,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-293

GASTON COUNTY DYEING MACHINE COMPANY,

Petitioner,

v.

MARVIN W. BROWN,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

Questions Presented for Review

1. If a plaintiff sues his former employer under Title VII of the Civil Rights Act of 1964, on his own behalf and on behalf of a class of other, present and future employees of the defendant, alleging racial discrimination against blacks in pay, terms, conditions and privileges of employment, and if the district court orders the case tried as a class action and the case is so tried, and the district court renders a decision on the merits as to both the individual and class claims asserted, did either the fact that the individual plaintiff was a former employee not seeking reinstatement or the fact that his individual claim was dismissed deprive the court of appeals of discretion to order class relief for the protection of present and future employees of the defendant?

2. Is racial discrimination against blacks on the part of private employers actionable under 42 U.S.C. § 1981?

3. On the facts of this case, was it error for the court of appeals to hold that statistics, showing that almost all of the better paying jobs in petitioner's plant were held by whites and that almost all blacks were kept in menial low-paying jobs, gave rise to a prima facie showing of racial discrimination, that the evidence presented by petitioner had not rebutted this presumption, while other evidence had corroborated it, and that the case should therefore be remanded to the district court for retention on its docket for a reasonable time, at the end of which the district court may dismiss the action if it finds that unlawful employment practices have been eliminated but must issue appropriate injunctive relief if it finds that such practices remain?

4. On the facts of this case, was it error for the court of appeals to direct that plaintiff be awarded his costs and reasonable counsel fees?

Statement of the Case

This action was filed in the United States District Court for the Western District of North Carolina on May 31, 1966. Respondent Marvin W. Brown (hereinafter "plaintiff") sued "to secure protection of and redress deprivation of rights secured by (a) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e . . . and (b) 42 U.S.C. § 1981 . . . ." (Complaint ¶1, A3).* The complaint specifically designated the action as a class action under Rule 23 of the Federal Rules of Civil Procedure. Injunctive relief against racial discrimination and against denials of

* Page references herein prefaced by "A" relate to pages in the record on appeal to the court of appeals. Page references to the appendix to the Petition for Certiorari are designated "——a").

equal employment opportunity rights granted by both of the aforementioned statutes was requested on behalf of both the plaintiff individually and the class, as well as back pay for the plaintiff individually. (A3-7).

The answer denied plaintiff's allegations of discrimination. (A6-8). Petitioner moved to dismiss the complaint on the ground that the Equal Employment Opportunity Commission had not undertaken conciliation efforts. A district court order of dismissal was reversed by the court of appeals, 405 F. 2d 887 (4th Cir. 1968), and certiorari was denied, 394 U.S. 918 (1969).

The defendant then challenged the standing of plaintiff to pursue this claim as a class action. On August 26, 1969 the district court entered an order determining that this action was a proper class action under Rule 23(a), (b)(2), of the Federal Rules of Civil Procedure. (A14). Petitioner did not thereafter move to amend this order, and the case was tried on the merits, as a class action, on September 29 and 30 and October 1, 1970.

The district court in an Opinion and Order filed December 31, 1970, denied both the individual and class claims for relief and dismissed the action. (24a). The court found that although plaintiff had completed a two-year college course in welding and related skills, he was employed by petitioner in 1960 to do "picking and grinding" (28a), a low-skill, low-pay job (A15-17, 8a).* The district court

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* While the complaint had stated "The plaintiff was employed by the defendant in November, 1961 as a welder and worked as such through January 31, 1966 (¶VII, A4), the answer responded that plaintiff had commenced employment with defendant "on June 29, 1960, and having been transferred during such period of employment to the job of welder-fabricator trainee in November of 1961 (¶VII, A7). The chronology set forth in the answer was correct, and the case was tried on that basis, with considerable

found: "Brown asked for employment as welder and was given to understand by supervisory people that it was premature to try to place a Negro in a job as welder with the defendant." (28a). Only when the president of the company personally intervened over a year later was plaintiff given a welding job. (*Id.*).

The district court found that once plaintiff was assigned to welding, he was subject to no further discrimination, and denied him any individual relief. (29a-30a). It gave no explanation for its failure to accord relief for the period from June 1960 to November 1961 during which petitioner was barring all blacks from welding jobs.

Class relief was also refused, despite the district court's findings that "at least in prior years, welding and high pay in the defendant's shop were not for black men" (30a), and "No black employees participated in the welder training program until about 1968." (27a). The reasons assigned by the court in denying relief to the class were the long-standing desegregation of company functions, announcement by the petitioner in 1965 when Title VII became effective that it would be observed, a finding that "advertisements for welders for at least two years [!] have been without regard to race," the "genuine" and often successful efforts of petitioner to recruit black workers for the higher paying welding jobs, and that blacks sometimes dropped out of welding work. (30a-31a).

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testimony addressed to the circumstances of plaintiff's hiring and initial assignment as a pickler and grinder in 1960. (E.g., A89-93, A186-191, A322). Issues concerning this period were properly before the court, since ¶VII of the complaint alleged, inter alia, "Throughout plaintiff's employment with the defendant, the defendant has limited and classified plaintiff . . . solely because of the plaintiff's race and color." (A4).

On appeal, the court of appeals held:

1. The district court's findings established that the petitioner had violated 42 U.S.C. § 1981, by denying plaintiff a welding job because of his race between the time he applied in 1960 and the time he was assigned to welding in 1961, and that he was therefore entitled to back pay in the amount of the difference between what he had earned and what he would have earned as a welder. (4a).

2. The district court's finding that plaintiff had not been the victim of racial discrimination after he had become a welder was supported by the record and was binding on appeal. Thus, plaintiff's claim for individual relief under Title VII for this period was denied. (4a-5a).

3. The failure of the plaintiff to prove his individual Title VII claim did not deprive the class he represented of a remedy. (5a). At least a prima facie case of racial discrimination against the class of black employees was shown by the striking concentration of whites in the higher paying positions and blacks in the lowest (7a-9a), which was not rebutted by such efforts as the petitioner made since 1965 to hire and promote black employees. (10a). The court also noted the long delay on the part of petitioner in admitting blacks to its after-hours training program in welding (5a-6a), and it found that the petitioner's lack of objective, formal guidelines for hiring, promotion and transfer, and its failure to give notice of vacancies within the plant except by word of mouth (6a, 10a-12a) served "to corroborate, not to rebut, the racial bias pictured by the statistical patterns of the company's work force." (12a).

4. Despite improvement in many of the petitioner's practices, most of which had occurred since institution of

this suit, the transition to a shop free from discrimination was still incomplete. (12a-13a). If the litigation were prematurely terminated, members of the class might run the risk that this progress would abruptly end. The case was therefore remanded to the district court "for retention on its docket for a reasonable time. If, at the end of this period, the court finds that the company's employment policies have completely eliminated the unlawful practices prohibited by § 703(a) [of the Civil Rights Act of 1964], it may dismiss this action. However, if any unlawful employment practices remain, the court must order appropriate injunctive relief. In either event, the plaintiff is entitled to recover his costs and reasonable counsel fees." (13a).

Rehearing en banc was denied on May 22, 1972. (23a).

ARGUMENT

1. *Class Relief:* Petitioner contends that the class relief awarded by the court of appeals was improper, on the ground that the named plaintiff had not proved his individual claim under Title VII of the Civil Rights Act of 1964 and that he had resigned from employment with the petitioner before instituting this action.

Over a year before the trial the district court had ordered that the action be maintained as a class action "insofar as it seeks injunctive relief from the alleged racially discriminatory employment practices existing at any time since the effective date of Title VII . . . . The class which the plaintiff represents includes those Negroes presently employed as well as those who may subsequently be employed by the defendant . . . ." (A14). The Title VII aspect of the case was tried as a class action, and the

district court's decision dealt (albeit adversely) not only with the plaintiff's individual claim but also specifically with the claim for class relief. (30a-31a). When the plaintiff appealed to the Court of Appeals from the district court's denial of both individual and class relief, the defendant's brief argued only the correctness of the district court's decision on the merits, but did not cross-appeal from the order that the case be maintained as a class action. Only now, in its petition for certiorari, does the petitioner raise this question.

But even if this issue could properly be raised before this Court at this late date, petitioner's position has no merit. The test, under Rule 23 of the Federal Rules of Civil Procedure, is not whether the claims of the class representative are identical with those of the class—only whether they are "typical" of them. When an employer practices discrimination against blacks, it characteristically creeps into almost every aspect of his employee relations—hiring, job assignments, promotions, transfers, discharge. We have found no case in which a court has held that the victims of each of these manifestations of an over-all discriminatory policy must be placed in a separate class and that one who has suffered from one of these forms of discrimination is barred from representing a class including victims of other forms. The courts have consistently recognized that the claims of one who has suffered from racial discrimination in one of these respects are typical of those who have suffered from racial discrimination in any of them. It is the discrimination that is the common denominator.

> "Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. This does not mean, however, that the effects

> of the discrimination will always be felt equally by all the members of the racial class .... But although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class." *Hall* v. *Werthan Bag Corp.*, 251 F. Supp. 184, 186 (M.D. Tenn. 1966)*

Thus, the courts have consistently held that named plaintiffs in Title VII actions may represent not only those who suffered racial discrimination in identical form, but all victims of the racially discriminatory practices of the same employer.

For example, individual plaintiffs claiming that they were denied employment because of their race may represent a class that also includes incumbent employees, and secure injunctive relief against racial discrimination in the conditions of their employment. *Carr* v. *Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir. 1970), cert. denied, 400 U.S. 951 (1970). An individual plaintiff claiming to have been discharged for racial reasons may represent a class of all past, present and future black employees and seek plant-wide relief against racial discrimination not only in firing of employees but also in hiring, promotion and maintenance of facilities. *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). A

* "The very nature of a Title VII violation rests upon discrimination against a class characteristic, i.e., race, religion, sex or national origin." *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 428 (8th Cir. 1970). See also *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303, 311 (5th Cir. 1970).

pensioner claiming that he had previously been a victim of discriminatory discharge may pursue a class action complaining of discrimination in hiring, promotion and seniority, as well as his individual claims. *Hackett* v. *McGuire Brothers, Inc.*, 455 F.2d 442 (3rd Cir. 1971). An employee, whose individual claim was one of racial discrimination in refusing to give him a promotion, was permited to pursue a class action attacking every aspect of racial discrimination in employment by the defendant and the granting to him of the job he sought shortly after the suit was brought was held not to moot either his individual claim or his class action for injunctive relief on behalf of all black employees. The court specifically rejected the contention that there was no class represented by the plaintiff since the only other Negro denied the same promotion had also since been granted it, by asserting "this ignores element (2) of the claim—plant-wide system-wide racially discriminatory employment practices." *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 34 (5th Cir. 1968). Compare also *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963).

> "Congress has taken giant strides to legislate bias out of our economy. Given the tools that Congress has now provided, courts would be remiss if they were not used to the fullest extent. The broad Congressional purpose, expressed in the civil rights acts, of eliminating job bias can well be effectuated by allowing any Negro claiming that an employer has discriminated against him on racial grounds to sue to end all that employer's racial discrimination." *Mack* v. *General Electric Co.*, 329 F. Supp. 72, 75-76 (E.D. Pa. 1971).

And, as pointed out in *Mack*, "the across-the-board approach allows those who need not fear adverse job consequences to sue to end discrimination against those who

might fear to bring such suits, such as present employees concerned about job security." *Id.*

Thus, the only pertinent question in a case such as this is whether there has been compliance with the test set forth in Rule 23 (a)(4), F.R.C.P., that "the representative parties will fairly and adequately protect the interests of the class." As stated by Judge Medina in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968),

> "an essential concomitant of adequate representation is that the party's attorney be qualified, experienced, and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class." *

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* Nor does anything in the legislative history of the Equal Employment Opportunity Act of 1972, P.L. 92-261, amending Title VII, suggest an intention to narrow the Title VII class action law developed prior to the amendment's enactment; indeed, there is clear indication of Congressional recognition and approval of the line of cases allowing class actions broadly, and in particular permitting class representatives to assert claims on behalf of the class that differ from their individual grievances. This is reflected in the section-by-section analysis of the bill as it emerged from the Conference Committee, submitted by Senator Williams before adoption of the conference bill:

> "In establishing the enforcement provisions under this subsection 706(f) generally, it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits in Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves consideration beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints." 118 Cong. Rec. S.3462 (daily ed. March 6, 1972); 118 Cong. Rec. H.1863 (daily ed. March 8, 1972); see also 118 Cong. Rec. S.2300 (daily ed. Feb. 22, 1972).

Neither court below has indicated any doubt that this test has been met; indeed, the vigor with which this case has been pursued, on behalf of the class as well as of the named plaintiff, and the successful result accomplished on behalf of the class in the court below, themselves demonstrate how fairly and adequately the interests of the class have been protected. Certainly, what amounts to a determination by both courts below that the tests of Rule 23 have been met is scarcely appropriate for reconsideration, by this Court, and at this stage in the proceedings.

Neither can it be maintained that the loss by the plaintiff on the issue of his individual Title VII claim deprived him of standing to represent the class and required dismissal of the class aspects of the case after they had been fully tried. If this were so, class actions would have to be terminated whenever the individual plaintiff for one reason or another (e.g., promotion, settlement, disability, or discharge) lost his right to individual relief. *But cf. Jenkins* v. *United Gas Corp., supra.* And such a rule would offer an incentive to employers to find "valid" reasons to discharge plaintiffs who bring class actions under Title VII.

Thus, it is scarcely surprising that every court of appeals that has considered this question has ruled that the validity of a class action does not depend on the success or failure of the individual claims of the class representatives. *Yaffe* v. *Powers,* 454 F.2d 1362 (1st Cir. 1972); *Hackett* v. *McGuire Brothers, Inc.,* 445 F.2d 442 (3rd Cir. 1971); *Kahan* v. *Rosenstiel,* 424 F.2d 161 (3rd Cir. 1970); *Miller* v. *Mackey International, Inc.,* 452 F.2d 424 (5th Cir. 1971); *Johnson* v. *Georgia Highway Express, Inc.,* 417 F.2d 1122 (5th Cir. 1969); *Tipler* v. *E.I. duPont de Nemours & Co.,* 443 F.2d 125 (6th Cir. 1971); *Parham* v.

Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).*

Neither do the cases relied on by petitioner show a conflict in the circuits. In *Huff* v. *N.D. Cass Co.*, —— F.2d ——, 4 EPD ¶7775 (1972), a panel of the Court of Appeals for the Fifth Circuit affirmed findings of fact by the district court that two of the prerequisites of a class action set forth in Rule 23 were lacking—that the class was not so numerous that joinder of all members was impracticable, and that the plaintiff could not and would not fairly and adequately protect the interests of the class. Neither factor is present in the instant case; the order of the district court can only be regarded as finding precisely the opposite, and it was not thereafter modified or even challenged.

Moreover, even if the *Huff* case were in point, it appears to run counter to a long line of Fifth Circuit decisions, some of which are cited above; the Fifth Circuit has ordered a rehearing en banc, and has the case under advisement. At the most, what we have is not a conflict between circuits but rather a conflict between panels of the same circuit, which it is itself seeking to resolve. The issue is neither ripe nor appropriate for intervention by the Supreme Court.

Similarly, the Sixth Circuit case of *Heard* v. *Mueller Co.*, —— F.2d ——, 4 EPD ¶7904 (1972), is not in point.

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* Couching the issue in terms of plaintiff's "standing" adds nothing to an analysis of the problem. As pointed out by the Court of Appeals for the Third Circuit in *Hackett* v. *McGuire Brothers, Inc.*, *supra*, at 446, the statutory description, in Title VII, of a qualified complainant, "a person claiming to be aggrieved" "shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." The issue thus necessarily remains solely whether the requirements of Rule 23 of the Federal Rules of Civil Procedure have been met. See *Johnson* v. *Georgia Highway Express, Inc.*, *supra*, at 1124-25.

There the individual plaintiff did not originally bring his case as a class action; eleven months later and after having voluntarily left the company, he moved to change the nature of his action to a class action, the district court held the motion moot, and the court of appeals affirmed. There was obviously lacking the vigorous effort to protect the entire class from the inception of the action, that characterized the instant case, and to the extent that the district court might be deemed to have made a finding it was that the individual plaintiff would not properly represent the class; precisely the contrary elements were present in the instant case.

Moreover, here again, even if the *Heard* case were in point, it would reflect a conflict within the Sixth Circuit, since in *Tipler* v. *E.I. duPont deNemours & Co., supra,* another panel of the same circuit had specifically held that the discharge of the named plaintiff did not prevent the action from going forward, on behalf of those continuing in employment, against discrimination in promotions and other incidents of employment. Here too, if indeed there is conflict at all, it is an intra-circuit rather than an inter-circuit conflict which is asserted.

2. *42 U.S.C. § 1981:* Petitioner's criticism of the holding of the court of appeals in favor of the individual plaintiff pursuant to 42 U.S.C. § 1981 is equally untenable. Every court of appeals that has passed upon the question since the decision of this Court in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968), has held § 1981 applicable to racial discrimination, by private employers, against blacks. *Hackett* v. *McGuire Brothers, Inc.,* 445 F.2d 442 (3rd Cir. 1971); *Young* v. *International Tel. & Tel. Co.,* 438 F.2d 757 (3rd Cir. 1971); *Caldwell* v. *National Brewing Co.,* 443 F.2d 1044 (5th Cir. 1971), *cert. denied,* 404 U.S.

998 (1971); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971); *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970); *Brady* v. *Bristol Myers*, 459 F.2d 621 (8th Cir. 1972).

"[T]he same right . . . to make and enforce contracts," in § 1981, and "the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," in § 1982, were both derived from the same sentence of the same section (1) of the Civil Rights Act of 1866. This Court, in *Jones*, construed § 1982 to apply to private discrimination, with no requirement that state action be shown, and upheld the statute so construed as a valid exercise of the power of Congress to implement the abolition of slavery. There is no conceivable basis, in history or logic, whereby these provisions can be fragmented so that state action can be required for one to be invoked but not the other. Each of the courts of appeals cited above, now joined by that for the Fourth Circuit, has so held.

Moreover, this Court, in *Jones, supra*, at 442-43, n. 78, expressly overruled *Hodges* v. *United States*, 203 U.S. 1 (1906), an earlier case suggesting that § 1981 was inapplicable to employment discrimination in the absence of state action. See *Waters* v. *Wisconsin Steel Works, supra*, at 482. And, as a matter of principle, this rule in employment discrimination cases is an *a fortiori* application of the principle of *Jones*. Restrictions on the right to dispose of one's labor without discrimination are even more inherently badges of slavery than restrictions on the right to own property; there have been societies, such as ancient Greece and Rome, in which slaves were allowed to own property, but restraints on freedom to use one's labor as

one wishes is inherent in slavery, indeed virtually the definition of slavery.

It should also be noted that in its consideration of what was to become the Equal Employment Opportunity Act of 1972, P.L. 92-261, the House Committee on Education and Labor re-affirmed the intention of Congress in enacting Title VII that remedies for employment discrimination under other federal legislation would not be preempted, and specifically cited with approval the decisions in *Young* v. *International Tel. & Tel. Co.*, and *Sanders* v. *Dobbs Houses, Inc., supra.*, stating that they "have affirmed this Committee's belief that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." H.R. Rep. 92-238, pp. 18-19 (1971). See also the recognition that "charges of discriminatory employment conditions may still be brought under prior existing federal statutes such as . . . the Civil Rights Act of 1866", in the expression of views of a minority of the Committee which had unsuccessfully sought to make Title VII the exclusive federal remedy for employment discrimination. *Id.*, at 66.

Hence the decision of the court below on this issue is in accordance with the intention of Congress and with the decision of the courts of appeals of every other circuit that has considered it; it is completely consistent with the decisions of this Court; and it is correct as a matter of principle. Every factor leads to the same conclusion; there are no uncertainties, and no conflicts, for this Court to resolve.

Petitioner professes surprise, however, at the granting of backpay to the individual plaintiff pursuant to 42 U.S.C.

§ 1981, suggesting that it had no way of anticipating or meeting this issue in view of its understanding, at least prior to *Jones*, that § 1981 applied only to state action. This suggestion appears to be disingenuous. Petitioner or its lawyers may have misunderstood § 1981, but such misunderstanding was by no means universal. Plaintiff's complaint, filed in 1966 (two years before *Jones*) alleged violations of § 1981 as well as of Title VII of the Civil Rights Act of 1964. Moreover the case was not tried until September 1970,* over two years after *Jones* and over five months after *Waters* v. *Wisconsin Steel Works*, *supra*. Plaintiff's attorneys made quite clear at the trial that they were proceeding under both statutes. See, *e.g.*, A82, A235. And an entire section (point V) of their brief in the Court of Appeals was devoted to the question of the applicability of § 1981, and eight decisions of circuit and district courts in point were cited. Petitioner's attorneys never responded to this issue, but they can scarcely claim surprise at this late date.

The same considerations apply to their assertion that they were denied the opportunity to plead the statute of limitations to the claim under § 1981. It is far from clear that the applicable statute would have barred plaintiff's claim; but even if it were, there must eventually come a time when defenses not asserted must be regarded as waived. Cf. Rule 12 (h) (2), F.R.C.P. Even if petitioner would have had some basis before or at the start of the trial for asking permission to amend its answers in order to plead the statute of limitations, the time for such

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* The principal reason for the lapse of time was the attempt of the petitioner to challenge on grounds of exhaustion of remedies, the right of the plaintiff to proceed under Title VII. See p. 3, *supra*. This unsuccessful effort, which culminated in denial of certiorari by this Court, stalled the case for a period of almost three years.

amendment is long since past. The policy against assertion of state claims must have a counterpart in a policy against assertion of stale defenses.

Petitioner is also mistaken when it asserts that the only finding of the district court upon which the Court of Appeals based its holding that § 1981 was applicable to petitioner's refusal to employ the plaintiff as a welder was its statement, "Although Brown may have been originally denied a welding job because of race. . . ." (29). Petitioner overlooks the finding of the district court "Brown asked for employment as a welder and was given to understand by supervisory people that it was premature to try to place a Negro in a job as a welder with the defendant." (28a).

Neither is there merit in petitioner's objection to what it regards as a "retroactive" application of the *Jones* doctrine. As stated by the Court of Appeals for the Seventh Circuit in *Waters, supra*, at 484: "This argument is sufficiently answered by the fact that the Supreme Court has already applied the *Jones* case retroactively in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969)."

3. *Proof of Discrimination:* Petitioner's challenge to the decision of the court of appeals as to class discrimination is based upon misreading of the findings of the district court, of the decision of the circuit court of appeals, and of the applicable law.

The repeated references in the Petition for Certiorari (pp. 3, 13, 21 *et seq.*), to "findings" of the district court that petitioner had not engaged in racial discrimination in violation of Title VII, have no basis whatever. There were no such findings. If anything, a fair inference from the court's opinion would be that it did find such discrimina-

tion: ["T]here are some statistics and some testimony which show that, at least in prior years, welding and high pay in the defendant's shop were not for black men." (30a). "Advertisements for welders *for at least two years* have been without regard to race." (*Id.*). (emphasis supplied). "No black employees participated in the welder training program until about 1968." (27a). What the district court did was to reach a conclusion of law, that the steps petitioner had taken to treat blacks more fairly, most of them recent and since institution of this lawsuit, justified refusal of relief. (30a-31a).

Even if there had been a finding that petitioner had not engaged in discrimination in violation of Title VII, it would have been a finding of "ultimate fact" of which review on appeal is not hampered by the "clearly erroneous" rule. *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 423-24 (5th Cir. 1971) *Cert. denied*, —— U.S. —— (1972), and cases there cited. Moreover, even if the court had found that violations had ceased at the time of decision, this would not necessarily have precluded relief where there was a showing that the petitioner had been violating the Act in the past. *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 426, 429 (8th Cir. 1970); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968); *Local 53 of Int'l Ass'n of Heat & Frost Insulators and Asbestos Workers* v. *Vogler*, 407 F.2d 1047, 1055 (5th Cir. 1969). But the court actually made no findings whatever that can properly be read as absolving petitioner from having violated Title VII, either in the past or in the present.

The decision of the court of appeals is similarly misconstrued by petitioner. It did *not* base its conclusion solely on a single day's statistical tabulation (Petition, pp. 3, 13, 21, 22), or on a comparison between those figures

and the population statistics of the area. (Id. p. 3). It did *not* impose racial quotas or require that "the racial make-up of its various job categories shall become altered so as to correspond to that of the surrounding community" (Petition, p. 3, see also *id.*, pp. 21, 27), or that preferences be granted to minority employees (Id. pp. 27-30). And it did *not* bolster its conclusion by referring to a lack of "*written* objective criteria for promotion" (Petition, p. 31; italics in petition). We return, then, from the imaginary decision postulated by petitioner to the actual holding of the case.

What the court of appeals did hold was that the overwhelming statistical evidence of relegation of blacks with almost no exceptions to the least skilled and poorest paying jobs (7a-9a) was at least presumptive evidence of racial discrimination; that it had not been rebutted by the petitioner's efforts since 1965 to hire and promote black employees (10a); and that the lack of objective standards for hiring, pay increases and promotions (10a-12a), as well as the passing on of news of vacancies by word of mouth in a plant where job classifications were segregated, instead of the posting of notices (12a), "serve to corroborate, not to rebut, the racial bias pictured by the statistical pattern of the company's work force." (12a). It also pointed out that from 1958 to 1968, only one black employee was admitted to its after-hour training program (6a).

It is a truism that Title VII forbids concealed, as well as overt, racial discrimination. Such discrimination often can be most effectively proved through statistical evidence. Indeed, at least one court of appeals has held statistical evidence to have itself established a violation of Title VII as a matter of law. *Parham* v. *Southwestern Bell Telephone Co.*, *supra*, at 426. The court of appeals in the instant case did not go that far, basing its decision on the

failure of petitioner to rebut the inference to be drawn from the statistics, together with the corroborating factors set forth above (10a). But the courts of appeals have repeatedly held, without exception, that such statistical evidence is at least presumptive proof of discrimination. *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971), *cert. denied*, — v.s. — (1972). *United States* v. *Hayes International Corp.*, 415 F.2d 1038, 1041, 1043-44 (5th Cir. 1969); *United States* v. *IBEW, Local 18*, 428 F. d 144, 151 (6th Cir. 1970); *Cert. denied* 400 U.S. 943 (1970). *Marquez* v. *Omaha District Sales Office, Ford Division*, 440 F.2d 1157, 1160-61 (8th Cir. 1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir., 1970), *cert. denied*, 401 U.S. 954 (1971).*

The reliance by the court of appeals upon the other corroborative evidence of discriminatory practices by defendant was also in accord with precedent. The lack of objective standards in hiring, classification and promotion was held discriminatory in *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2d Cir. 1971); *Rowe* v. *General Motors Corp.*, 357 F.2d 348 (5th Cir. 1972); see also *United States* v. *Jacksonville Terminal Co., supra*, at 499. And the failure to post notices of openings for better jobs with dependence upon word of mouth communication by white employees and the resulting unlikelihood of blacks learning of the opportunities in time, has

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* As stated in *Jones* v. *Lee Way Motor Freight, Inc., supra*, at 247, "[i]n racial discrimination cases, statistics often demonstrate more that the testimony of many witnesses, and they should be given proper effect by the courts." See also *Alabama* v. *United States*, 304 F.2d 583, 586 (5th Cir. 1962), *affirmed*, 371 U.S. 37 (1962): "In the problem of racial discrimination, statistics often tell much, and courts listen"

similarly been held discriminatory in *Parham* v. *Southwestern Bell Telephone Co., supra,* at 427, and *United States* v. *Sheet Metal Workers, Local 36,* 416 F.2d 123, 137 (8th Cir. 1969); *Lea* v. *Cone Mills Corp.,* 301 F. Supp. 97 (DC NC 1969) aff'd in part and vacated in part *per curiam,* 438 F.2d 86 (4th Cir. 1971); *Clark* v. *American Marine Corp.,* 297 F. Supp. 1305 (E.D.La. 1969).

Petitioners assert, however, that the decision below conflicts with that of the Court of Appeals for the Fifth Circuit in *United States* v. *Jacksonville Terminal Co., supra,* at 446-48. But the court in that case clearly followed the mainstream of decisions holding that statistical evidence afforded prima facie proof of racial discrimination without any necessity of a showing of individual discriminatory acts. *Id.,* at 422, 448-49. It did hold, but as to one issue only (new hires), that the employer had met the burden of rebutting the statistical evidence by showing that, because of the unique facts of sharply declining employment in the railroad industry, coupled with a pre-Act history of restriction of certain positions to whites, the most experienced applicants for vacancies really were all white. *Id.* at 445. But it declined to find any such rebuttal as to promotions and transfers (*id.* at 448 *et seq.*), and even as to the new hires the court stated expressly:

> "All of the persons so hired were white. In a stable or expanding industry, this fact would be damning, especially in regard to unskilled or semi-skilled positions . . . ." (*Id.* at 445).

There is no comparable explanation for the statistics adduced in the instant case. Petitioner is engaged in a stable or expanding industry.* The facts, with respect

* The total number of hourly employees *rose,* from 216 in September, 1969 (8a) to 230 in September, 1970 at the time of trial (A384).

both to initial assignments and to transfers and promotions, are indeed "damning."

Petitioner's stress upon the fact that the employment statistics reflected the work force on a single day (Sept. 3, 1969), is scarcely well taken. The information was derived from petitioner's answer to plaintiff's interrogatories. The interrogatories were filed on June 30, 1966 (A9), and not answered by petitioner until September 18, 1969 (A15). Petitioner itself selected the date as of which the data was compiled. Nevertheless, if the figures at the time of trial, over a year later, had shown less of a segregated pattern, petitioner could have introduced such evidence, by way of explanation or rebuttal, at trial. It did not.*

Such belated efforts at compliance with Title VII as were undertaken by petitioner do not justify dismissal of the action. The pattern of almost total segregation of employees in low-paying jobs still persisted in September, 1969, over three years after the complaint had been filed in the instant case and over four years after the effective date of Title VII. The district court found "No black employees participated in the welder training program until about 1968." (27a). Such progress as has been made has occurred largely since the inception of this action (13a; see also 31a), but the Court of Appeals noted that if the action were prematurely dismissed members of the class would run the risk that progress would abruptly end. (13a). Accordingly, while it gave recognition to the efforts of petitioner by not ordering injunctive relief, it directed that the case be remanded to the district court

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* The Personnel Director of petitioner testified as to the work force as of the time of trial. The total number of black hourly employees had *dropped* from 29 out of 216 in September, 1969 to 24 or 25 out of 230 in September, 1970. No breakdown by job categories or pay scales was offered. (A384).

for retention on its docket for a reasonable time, directing that if at the end of that time the court found that illegal discrimination had been eliminated it might dismiss the action but that if it found that the unlawful practices were continuing it must order injunctive relief. (13a).*

This procedure was in conformity with that ordered by the Eighth Circuit in *Parham* v. *Southwestern Bell Telephone Co., supra.* Moreover, later repentance does not necessarily render even injunctive relief inappropriate, much less the less stringent form of relief ordered by the Court of Appeals. *Parham, supra; Jones* v. *Lee Way Motor Freight, Inc., supra,* at 248; *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632-33 (1953); *Rowe* v. *General Motors Corp., supra.*

4. *Counsel Fees:* petitioner also challenges the direction of the Court of Appeals, in remanding the case to the district court, to award the plaintiff costs and counsel fees. The award of counsel fees in Title VII cases, and presumably also in 42 U.S.C. § 1981 cases, is discretionary; nevertheless, where a refusal by a district court to award counsel fees would be an abuse of discretion it is entirely fitting that the Court of Appeals in remanding the case direct that such an award be made. Economy of judicial effort is served thereby.

The propriety of counsel fees in the circumstances of this case is clear. The decision below is in accord with precedent. While petitioner stresses that the plaintiff lost on his individual Title VII claim, he won on his claim under Sec. 1981 and, more importantly, he won a significant

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* Contrary to petitioner's assertions (Petition, pp. 3, 21, 27), the Court of Appeals did *not* require that to establish compliance petitioner must meet any racial quotas, achieve recial balance in job categories, or give preferential treatment to racial minorities.

victory for the class of other black employees, present and future, of the petitioner. In the almost identical circumstances of *Parham* v. *Southwestern Bell Telephone Co., supra,* the individual plaintiff failed with respect to his personal claim, but succeeded in persuading the appellate court to order a remand of the cause to the district court to retain jurisdiction in order to ensure continued progress toward equal employment. The court stated, at 429-30:

> "Although we find no injunction warranted here, we believe Parham's lawsuit acted as a catalyst which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII. In this sense, Parham performed a valuable public service in bringing this action. Having prevailed in his contentions of racial discrimination against blacks generally prior to February, 1967, Parham is entitled to reasonable attorney's fees . . . ."

See also *Lea* v. *Cone Mills Corp.,* 438 F.2d 86 (4th Cir. 1971); *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 804 (4th Cir. 1971), *cert. dismissed,* 404 U.S. 1006 (1972).

In the case of Title II (the public accommodations provisions) of the same Civil Rights Act of 1964, identical language as to counsel fees* was applied by this Court to hold that it was an abuse of discretion to refuse to grant such fees to the victorious plaintiff:

> "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form

* Compare § 204(b), 42 U.S.C. § 2000a-3(b), with § 706(k), 42 U.S.C. § 2000e-6(k).

only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fee, a few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

"It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. Because no such circumstances are present here, the District Court on remand should include reasonable counsel fees as part of the costs to be assessed against the respondents." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402-403 (1968) (footnotes omitted).

And even in the absence of specific statutory provision for counsel fees, success on behalf of a class may itself be sufficient reason for such an award. *E.g., Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1969).

CONCLUSION

As demonstrated above, the Court of Appeals in this case did no more than remand the case to the district court for entry of an order in conformity with the facts found by the district court and to retain jurisdiction of the case for entry of such future orders as might be necessary. This remand—consistent with the decisions of other circuits—is merely an example of the Court of Appeals based on the record as a whole exercising its supervisory administrative responsibilities over the district courts to ensure proper case management. The petition for a writ of certiorari should be denied.

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